SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-324

THE CITY OF DALLAS, TEXAS, THE CITY OF FORT WORTH, TEXAS, and the DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Petitioners,*

v.

SOUTHWEST AIRLINES CO. and the TEXAS AERONAUTICS COMMISSION, *Respondents.*

BRIEF IN OPPOSITION FOR RESPONDENT, SOUTHWEST AIRLINES CO.

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v.

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BRIEF IN OPPOSITION FOR RESPONDENT, SOUTHWEST AIRLINES CO.

Respondent, Southwest Airlines Co. ("Southwest"), respectfully prays that a writ of certiorari be denied herein. This case does not involve airspace control or management in the interests of either safety or efficiency. It is, therefore, completely distinguishable from *United States* v. *City of New Haven*, 496 F.2d 452 (2nd Cir. 1974), appeal filed sub nom. *Town of East Haven* v. *United States*, 43 U.S.L.W. 3124 (U.S. July 30, 1974, No. 74-37), in which this Court recently de-

nied certiorari. 43 U.S.L.W. 3255 (October 29, 1974). This case involves only a jurisdictional squabble between the State of Texas and the City of Dallas as to which has the right, under Texas law, to determine the routes of a State certificated, commuter airline operating solely within the boundaries of Texas and not subject to the jurisdiction of the Civil Aeronautics Board ("CAB"). As such, this case clearly presents no "special and important reasons" for granting review on writ of certiorari.

QUESTIONS PRESENTED

1. Whether certain Federal statutes, establishing criteria of eligibility for Federal aid to local airport development projects, supersede the Federal Aviation Act of 1958, which, as a matter of public convenience and necessity, delegates to the Civil Aeronautics Board the power to determine airport points of service for interstate airline transportation, and preserves the identical power in the states for intrastate airline transportation.

2. Whether, in violation of the Texas Constitution and general laws, the City of Dallas can make determinations of public convenience and necessity with respect to intrastate commuter service by Southwest Airlines Co. at Love Field, a public facility which remains open for aeronautical activity.

3. Whether the attempt to exclude Southwest Airlines Co. from Love Field, by municipal ordinance or otherwise, constitutes unjust discrimination; the impermissible grant of a right of exclusive use; a violation of Dallas' own covenants in bonds owned by Southwest Airlines Co.; a violation of the Administra-

tive Procedure Act, 5 U.S.C. Secs. 554 and 556, and of the Fifth and Fourteenth Amendments to the United States Constitution; a violation of 49 U.S.C. Sec. 1374 (b); a violation of the Equal Protection Clause and of the right to travel freely and to have access to the navigable airspace; and unjust discrimination on the basis of wealth.

STATEMENT OF THE CASE

Southwest sets forth its own Statement of the Case in order to correct inaccuracies and to supply omissions in Petitioners' Statement.

This litigation concerns Southwest's right to provide intrastate commuter air service through Dallas' downtown airport, Love Field ("Love"), rather than through the outlying Dallas-Fort Worth Regional Airport ("DFW"), which opened on January 13, 1974. In comparison to District of Columbia air service, Love Field is the equivalent of Washington's National Airport and DFW is the equivalent of Virginia's Dulles Airport. (R. 595) [1]

The controversy arose in the following manner.

1. *The Dallas-Fort Worth Regional Airport.* In 1962, CAB certificated air carriers served Fort Worth through Greater Southwest International Airport ("GSIA") and Dallas through Love Field, although the two airports are only twelve air miles apart. (R. 1972) As testified to by Mr. Henry L. Newman, Director of the Southwest Region for the FAA, such an arrangement became "an economic burden on the airlines

[1] Record references are to the printed Appendix filed in the Court of Appeals, using the typed numbers appearing in the middle of each page of such Appendix.

to the point that the service to both cities was being jeopardized." (R. 544) In large part, as related by Mr. Newman, this burden resulted from the advent of commercial jet aircraft, which "are just a lot more costly . . ., it's just completely uneconomical for jets to make landings at such close proximity." (R. 958)

Motivated by their own economic problems, the CAB air carriers prevailed upon the CAB to institute the Dallas-Fort Worth, Texas, Regional Airport Investigation, Docket No. 13959, which commenced on August 20, 1962 pursuant to CAB Order No. E-18719. (R. 1971) This Order is reprinted in Respondent's Appendix A. It recites that regional airport investigations are "a vital part of our effort to assist the air transportation industry to realize the full economic potential of its greatly expanded capacity in new high performance equipment without resulting in inconvenience to the users and without adversely affecting, the public interest . . . ." It ordered that the Dallas-Fort Worth Regional Airport Investigation be instituted "to determine whether the public convenience and necessity require the alteration, amendment or modification of the certificates of all air carriers[2] authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Forth Worth be served through a single airport to be designated therein." It directed that the CAB certificated carriers serving Dallas and Fort Worth be "made parties to this proceeding."

---

[2] Under the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 (3) and (10), "air carrier," with respect to domestic operations, refers only to airlines engaged in interstate air transportation or the transportation of mail. Southwest is not engaged in interstate air transportation nor does it carry mail.

Thereafter, the CAB held hearings in which the issue presented was whether or not the certificates of its carriers should be amended so as to require them to serve only Love Field or GSIA. Braniff Airways, Inc. ("Braniff") and the City of Dallas ("Dallas") presented extensive evidence showing that Dallas generated approximately 80% of the air passengers in the area and that short haul (under 300 miles) passenger traffic would be drastically inconvenienced and dramatically reduced if the CAB should designate outlying GSIA as the sole CAB air carrier airport. (R. 1911-12; 4900-5088; 5095-5329) DFW is as far from Dallas as GSIA, and Braniff was the principal short haul carrier in the Dallas market prior to entry by Southwest. (R. 1419; 1426; 1913-14) Subsequently, Texas International Airlines ("TI"), the only other CAB air carrier with a substantial stake in the Dallas short haul markets, informed the CAB that: (i) transfer of its service from Houston's downtown Hobby airport to Houston's outlying Intercontinental Airport had caused a $2,200,000 decline in revenue the first year due to loss of short haul passengers; (ii) the similar move from Love to DFW would have a "violent impact" because the "time for ground transportation from the airport to Dallas will now be longer than some of these [short haul] flights, thus making the automobile far more competitive for the inter-city traffic"; and that, for these reasons, (iii) TI "may well require [increased subsidy] assistance in coping with the cost escalation and traffic dislocation" involved in its move to DFW. (R. 5625) At that time, twenty-five percent of TI's passenger traffic enplaned at Love, and not all of it was short haul in nature. (R. 5625) All of Southwest's traffic is short haul, and 95% of it originates or terminates at Love. (R. 1420)

TI is subsidized by the CAB. (R. 1261) Southwest receives no subsidy. (R. 1261)

The FAA appeared before the CAB in the CAB's Regional Airport Investigation and advocated selection by the CAB of GSIA as the CAB air carrier airport. (R. 896) Instead, the CAB granted Dallas and Fort Worth ("Cities") time to agree upon either GSIA or Love as such airport, stating, in Order No. E-21341 issued on September 30, 1964, that "the Board is now of the unanimous opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental cargo and passenger service." (R. 1978-80) Because of inflamed municipal rivalries, the Cities could not so agree and, hence, they decided to build gigantic DFW at Grapevine, Texas, which is midway between the two cities and just north of GSIA. (R. 630; 1419; 1426) The CAB did not envision, nor order, the construction of DFW, and, in fact, it later terminated its Regional Airport Investigation without amending the certificates of its air carriers so as to require them to serve DFW. This Order, No. 73-9-82, is reprinted in Respondent's Appendix B. Petitioners have applied to reopen the Investigation for the purpose of amending the CAB certificates, an action which demonstrates their complete lack of faith in the effectiveness and enforceability of both their own 1968 Concurrent Bond Ordinance and the FAA's National Airport Plans, discussed subsequently.

When the FAA learned of this surprising DFW decision in September of 1965, Mr. Henry L. Newman flew to Washington, D. C., and, at an informal conference, obtained an oral commitment from General

McKee, then Administrator of the FAA, for Federal grants under the Federal Airport Act of 1946, ch. 251, 60 Stat. 170. (R. 896) This commitment was, of course, made before DFW was included in the National Airport Plan, as required under the 1946 Federal Airport Act, 49 U.S.C. Sec. 1108. Mr. Newman testified that:

> ". . . one of the things that General McKee said to me was this, 'This is a major decision, because we're giving up an investment at Greater Southwest, [which has to be closed because of an air traffic control conflict with DFW,] and whatever we do today means that we're committed to follow through on the development of this airport." (R. 897)

The first grant to DFW, for land acquisition, was made on June 24, 1966. (R. 896)

Mr. Newman also testified that General McKee had one major question during their September, 1965 meeting: "What assurance do we have that this new airport is going to be used by the airlines?" (R. 897) Mr. Newman reportedly thereupon told General McKee:

> ". . . very emphatically that it was the determination . . . that one of the basic commitments on this airport would be that if this airport was developed, that all of the airlines would transfer their activities to the new airport, and had it not been for that decision, the FAA would not have concurred in the development of this airport or the commitment to put the what is now 60 some million, and I assume will be substantially greater than that in the years to come." (R. 897)

This hearsay testimony as to an oral exchange between two FAA officials, wherein Mr. Newman apparently

purported to speak for both the CAB and the Texas airline regulatory authority, constitutes the only "evidence" in the entire record of this case of any Federal "action" designed to insure that all airlines would serve DFW. It is also the cited source for the statement on page 9 of the Petition that Federal aid was predicated upon a "series of assurances that all scheduled airline activity would be conducted at the Regional Airport. (R. 897)." There is no Federal hearing, rule, regulation, decision, order, or grant agreement, by the CAB or the FAA, which requires either Federal or State airlines to serve DFW, and none are cited in the Petition.

Having agreed upon the Grapevine location, the Cities proceeded to arrange funding for DFW. The citizens of Dallas County voted down financing for an autonomous Regional Airport Authority authorized by the Texas Constitution, whereupon the two City Councils, by contract, created the Dallas-Fort Worth Regional Airport Board ("Airport Board") to act as an administrative arm of both Cities with respect to the construction and operation of DFW. (R. 8-9; 1580-81; 4690-4707)

In November, 1968, the two Cities respectively adopted the 1968 Regional Airport Concurrent Bond Ordinance ("1968 Ordinance"), pursuant to which they sold $35,000,000 worth of revenue bonds to local interests and which is the model for five subsequent ordinances authorizing sale of an additional $387,000,000 in revenue bonds. (R. 2040-3690; 517-19) These bonds are basically payable out of the revenues of DFW. (R. 2147) DFW revenues will always be sufficient as the eight CAB air carriers now serving the Cities have, by private contract, agreed to transfer

their "Certificated Air Carrier Services" to DFW and to underwrite any deficit arising from its operation, including all operations and maintenance expenses and 1.25 times the annual debt service on the DFW revenue bonds. (R. 3691-786; 876; 1722-24; 1816) This is a mutually beneficial financing arrangement by which the CAB air carriers receive lower interest rates on the construction of needed airport facilities, because the bonds in question are tax free municipals, and the Cities are provided with suitable airport accommodations without any financial risk on their part. (R. 1558; 1561; 1572-73; 1816) The Director of Finance for DFW testified with respect to this arrangement as follows:

> "Q. Isn't it true, Mr. Laman, that really what you have done out there at the Regional Airport is to make all of these [CAB] airlines a partner in the airport itself, in effect?
> "A. That's correct." (R. 1758)

Thus, the CAB air carriers provoked the Regional Airport Investigation in order to relieve themselves of an uneconomical dual airport operation; the CAB, acting in the interest of public convenience and necessity, obliged by stimulating the Cities to designate a single airport for interstate air service; the Cities resolved their civic differences by electing to construct DFW at Grapevine; the CAB air carriers voluntarily agreed to transfer their "Certificated Air Carrier Services" to DFW and to become "partners" of the Cities by paying any deficit at the new airport; and, since all concerned were receiving just the economic benefits they wanted from their partnership, there was complete harmony until Southwest began operations and the Cities, at the behest of their CAB partners, attempted to coerce it into the partnership.

This coercion is predicated upon the 1968 Ordinance adopted by Dallas. This Ordinance represents the only relevant, legally significant action ever undertaken, by any Federal or State governmental body or agency, in order to control and restrict the use of Love Field as such. Section 9.5 of the Ordinance makes it perfectly plain that such restrictions are not designed to enhance the public convenience and necessity, nor to achieve safer and more efficient utilization of the navigable air space. They are, purely and simply, designed to suppress free competition so that revenues at DFW will be maximized for the benefit, not of the Cities, but of the underwriting CAB air carriers:

> "Section 9.5. Competition, Optimum Airport Development.
>
> "A. It is acknowledged and understood by the Cities that they, in *Love Field*, Redbird, GSIA and Meacham Field, own and operate airports which by their nature are *potentially competitive with the operation of the Regional Airport.* It is further acknowledged and recognized that *the revenues to be derived from those airport facilities are not*, under the terms of this Ordinance, *pledged to the payment of the Bonds*, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities, each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall *take such steps as may be necessary, appropriate*, and *legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field*, Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport* effective upon the beginning of operations at the Regional Airport.

"From time to time hereafter, the Board may review the effect and application of such covenant, and, by concurring action of not less than eight (8) of its members, *the Board may reasonably limit its scope and effect and may waive its application in specific instances* if it shall first determine that such action is necessary (1) in the interest of the *public safety*; (2) in the interest of *prudent and efficient operations* at the Regional Airport; or (3) *in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region considered as a whole.* However, in order to promote, by voluntary agreement, the full use of the Regional Airport at the earliest practicable date by commercial air carriers, *the Board shall be authorized* to establish policies and *to make* uniformly applicable and non-discriminatory *agreements with air carriers regarding the instances if any, in which the above power granted to the Board will or will not be exercised, and no limitations on such covenant shall be promulgated or its application in specific instances waived if the result thereof would be to violate such agreements.* . . ."

* * *

"B. In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the *Cities further agree that they will* through every legal and reasonable means *promote the optimum development* of the lands and Facilities comprising the *Regional Airport* at the earliest practicable date, *thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the Board will undertake with regard to* the Regional Airport, *Love Field*, GSIA, Meacham Field or Redbird, *any action, implement any policy, or enter into any agreement or contract which by its or their nature*

> *would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and Facilities* at the earliest practicable date; . . ." (R. 2195-97)

In two sections, this remarkable city Ordinance not only attempts to restrain trade and commerce in Dallas but also purports to usurp the powers of the FAA, of the CAB, and of the Texas Aeronautics Commission ("TAC") by permitting the Airport Board to authorize resumption of "Certificated Air Carrier Services" at Love in the interests of "public safety," "prudent and efficient operations," or "an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan region . . . ;" provided, however, that the Airport Board has not earlier entered into a contrary, supervening agreement with the CAB air carriers "regarding the instances, if any, in which the above power granted to the Board will or will not be exercised . . . ."

2. *Southwest Airlines Co.* Southwest is an intrastate, short haul, commuter carrier providing air service between only the Texas cities of Dallas, Houston, and San Antonio. (R. 1278-80) Its operations are certificated solely by the Texas Aeronautics Commission and not by the CAB. (R. 1915-17; 1956) Over its routes, it does, however, compete with several CAB certificated air carriers, principally Braniff and TI, which carry intrastate passengers but are not certificated by the TAC. (R. 1383; 1916-17)

As a short haul, intrastate commuter carrier similar to California's Pacific Southwest Airlines ("PSA"), Southwest's sole mission is to serve the public convenience and necessity of Texas air passengers commuting between Houston, Dallas, and San Antonio,

three cities which are an average of only 230 miles and 45 minutes apart by air. (R. 1284; 4434) Unlike the long haul CAB air carriers, Southwest must strenuously compete with ground transportation for 100% of its passengers, since travel by private automobile, bus, and train provides exceedingly feasible alternatives to air transportation in its markets. (R. 1420; 1444; 1954-55) Consequently, the TAC has charged Southwest with the responsibility of reducing *total* trip time and expense for the short haul commuter passenger, insofar as it is within the Company's power to do so. (R. 1284-91; 1300-08; 1915)

In order to promote and expand its distinctive short haul commuter air passenger market, Southwest has provided service far superior to that of the CAB air carriers who preceded it in the market. It has, for instance, furnished 98.7% on-time performance; 99% completion of its scheduled flights; 10 second cash register ticketing; expedited baggage handling; faster reservations service; and $13.00 fares, more than 50% lower than the CAB fares in the market prior to Southwest's entry in June, 1971. (R. 1284-91; 1300-11; 1965-66) See *Texas Aeronautics Commission* v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (1970), *cert. denied* 400 U.S. 943, for a factual discussion by the Texas Supreme Court of the poor quality of CAB air carrier service preceding Southwest's market entry.

The most significant and crucial move made by Southwest in order to better accommodate the commuter passenger was its reopening of Houston's close-in Hobby Airport to scheduled commercial air service. This was accomplished with the complete blessing of the City of Houston and resulted in a quantum leap in the number of local passengers carried by

Southwest. (R. 1297-99) In fact, if Southwest had not ceased serving Houston's outlying Intercontinental Airport and moved its operations to close-in Hobby instead, it would be bankrupt today. (R. 1298-99) As it is, the whole Houston-Dallas commuter air passenger market, which was completely stagnant prior to entry by Southwest, is now growing at the rate of over 50% per year and Southwest is a financial success. (R. 1452; 1317-18; 4419-20) Obviously, therefore, Southwest's improved service at lower fares to Houston's close-in Hobby Airport stimulated the short haul market and caused tremendous numbers of people to fly who would otherwise be utilizing ground transportation or not traveling at all. (R. 1317-19; 1498)

The increased ground travel time and expense involved in getting to an outlying airport adversely affects short haul air transportation, which is why air travel under 300 miles declined 16% after Houston's distant Intercontinental Airport opened as the sole airport in Houston, while air travel over 300 miles increased by 23%. (R. 1454; 4451-52)

3. *Southwest Airlines Co.* v. *DFW.* Southwest was certificated by the TAC on February 20, 1968, nine months prior to adoption of the 1968 Ordinance, and commenced operations on June 18, 1971, one year after the CAB air carriers had executed the letters ("Letter Agreements") whereby they voluntarily agreed to transfer their "Certificated Air Carrier Services" to DFW and to underwrite its deficits. It is understandable, however, that Southwest was not consulted on either the 1968 Ordinance or the Letter Agreements, as no one outside the Company suspected that it could survive the deluge of proceedings instigated against it by, or for the benefit of, CAB air carriers. The peti-

tion for a writ herein represents the nineteenth judicial or administrative matter concerning Southwest's operating authority, since it applied for a certificate of public convenience and necessity in November, 1967. (R. 1916-49; 333-40) Of these proceedings, the following, listed in chronological order, are reported: *Texas Aeronautics Commission, et al.* v. *Braniff Airways, Inc., et al.*, 439 S.W.2d 699 (Tex.Civ.App. 1969); *Texas Aeronautics Commission et al.* v. *Braniff Airways, Inc., et al.*, 454 S.W.2d 199 (Tex. Sup. 1970); *Braniff Airways, Inc., et al.* v. *Texas Aeronautics Commission, et al.*, 400 U.S. 943; CAB Docket No. 23122, Order 71-6-79 (June 15, 1971); *Texas Aeronautics Commission, et al.* v. *Betts*, 469 S.W.2d 394 (Tex. Sup. 1971); CAB Docket No. 23047, Order No. 71-9-23 (September 3, 1971); *Braniff Airways, Inc., et al.* v. *CAB, et al.*, 473 F.2d 1150 (D.C. Cir. 1972); CAB Agreements 22548-52 and 22665, Order 72-6-1 (June 27, 1972); *City of Dallas, et al.* v. *Southwest Airlines Co., et al.*, 371 F. Supp. 1015 (N.D. Tex. 1973); *City of Dallas, et al.* v. *Southwest Airlines Co., et al.*, 494 F.2d 773 (5th Cir. 1974); *City of Dallas, et al.* v. *Southwest Airlines Co., et al.*, No. 74-324 (U.S. Sup. Ct.). In addition, three proceedings before the TAC: two in State District Court; one in Federal District Court; one before the Bureau of Enforcement of the CAB; and one before the Airport Board are not reported.

Southwest refused to execute a Letter Agreement with the Airport Board and has never, either expressly or impliedly, been ordered to serve DFW by its regulatory agency, the TAC, which has, in fact, directed it to stay at Love. (R. 4366-69) Southwest's position on this issue is dictated by considerations of public convenience and necessity, which are inextricably inter-

twined with its own survival as an airline. Southwest serves a distinctive market within the airline industry: the short haul commuter passenger. He constitutes its *only* public. If it fails him, it fails.

Forcing Southwest to serve DFW is the equivalent of requiring Eastern Airlines to provide its New York-Washington, D.C. shuttle service through Dulles Airport. There can be no doubt that the added ground travel time and expense to DFW would injure the public interest by deterring the short haul commuter passenger from flying, or even traveling at all, between the cities served by Southwest. The record is overwhelmed with uncontroverted evidence on this point, of which the following are merely examples:

A. In every other city in the United States which maintains a dual airport system, short haul flights operate through the close-in airport and long haul flights through the outlying airport. Dallas is striving to become the only exception, although it admits that neither it nor the Airport Board have ever made any market studies or taken any public opinion surveys or passenger preference polls concerning the adverse impact the move to DFW will have upon short haul air transportation. (R. 1325-26; 678; 860-61; 1152; 1196; 1253-54; 1414; 1550; 1766-67; 1774)

B. Mr. John Eichner, of Simat, Helliesen & Eichner, transportation specialists who appear before the CAB more than any other firm in the country, testified that the short haul air passenger market would be seriously diminished if Southwest moved to DFW (R. 1416; 1427; 1444; 1491); that the taxi fare to DFW would be more than Southwest's $13.00 air fares on flights to Houston and San Antonio (R. 1443); that Southwest

had saved the short haul commuter passenger more than $4,000,000 in direct air transportation costs since commencement of operations, all of which would be dissipated if Southwest were required to serve DFW (R. 1421; 1443; 1481); and that Southwest might collapse if it were forced to DFW. (R. 1473)

C. The CAB itself has recognized that short haul airlines must necessarily serve close-in airports, stating in its decision in *Greensboro/High Point/Winston-Salem Service Through A Single Airport*, Docket No. 3496, Order E-17359 (August 24, 1961), that Piedmont Airlines, unlike the trunk carriers Eastern and United Airlines, should not be ordered to serve Winston-Salem through the distant Greensboro/High Point's Friendship Airport because:

> "... the examiner found that such consolidation would place an unreasonable financial, as well as operating, burden upon Piedmont and would impose considerable inconvenience upon the area's traveling public. We agree with his differentiation of Piedmont's situation from that of the trunklines in that Piedmont, as a local service carrier, is primarily required to provide service to the traveling public to and from relatively small cities over relatively short distances, and that Piedmont's breakeven need would be considerably increased by reason of a reduction of passenger revenue following consolidation...." 34 CAB 227, 231.

D. The FAA, through Mr. Newman, has stated that the long driving time between DFW and downtown Dallas, on the one hand, and Intercontinental and downtown Houston, on the other, will seriously inhibit air travel between these two cities. (R. 4416) The Governor's Committee on Transportation of the State of Texas concurs. (R. 1954; 5660; 5673-74)

E. The United States Department of Transportation ("DOT") is limiting the use of Washington's close-in National Airport to short haul flights and removing long haul flights to outlying Dulles Airport because, in the words of the FAA Administrator:

> "National—only ten minutes from downtown Washington—is ideally situated to serve the short-haul market where ground travel time is a significant part of the total trip and often a determining factor in whether a traveler goes by air or uses another mode of transportation.
>
> "Dulles is especially suited for the international and long-haul markets where ground travel time is a less critical factor. Its long runways, large ramp areas and modern terminal facilities were specifically designed for long-range, heavier aircraft and their users." (R. 4410)

F. Volume 215, Issue No. 26 (October 8, 1974), page 201, of *Aviation Daily*, a trade publication customarily read and relied upon in the aviation industry and reprinted as Respondent's Appendix C, reports, under the heading "AIRPORT AID PROGRAM BECOMING HEATED ISSUE," that:

> "Transportation Department is taking a close look at the Airport Development Aid Program (ADAP) to determine what it may want to 'change or throw out as a national policy,' according to Secretary Claude Brinegar . . . .
>
> "Brinegar said ADAP has become an 'increasingly hot policy issue.' This view is similar to one expressed earlier by Sen. Howard Cannon (D. Nev.), who said ADAP is expected to be the 'biggest issue' next year before Cannon's aviation subcommittee. (DAILY, Aug. 7)

> "*Bringar said that the era of the super airports such as Dallas Fort Worth is coming to an end.* Greater emphasis will be placed on managing the capacity of existing airports 'as best we can,' he said. *One way this could be done is by increasing use of airports replaced by giant complexes such as . . . Dallas Love Field.*" (emphasis added)

The facts are that every Federal and state regulatory authority recognizes the necessity of furnishing short haul air transportation through close-in airports; that this is the accepted policy and practice in every other American city having a dual airport system, including Washington, D.C. where the system is governed by the FAA; that increased use of Love Field is being proposed by the Secretary of Transportation; that neither the DOT nor the FAA have yet seen fit to intervene in this proceeding despite knowledge of its pendency prior to commencement of trial; and that the overwhelming evidence of public convenience and necessity incontrovertibly demonstrates that Southwest's presence at Love rather than DFW serves the public interest. Why, then, are the Petitioners before this Court on an FAA preemption contention, contrived under nonregulatory Federal grant statutes, when they did not even think highly enough of this argument to raise it in their District Court pleadings (reprinted in Respondent's Appendix D), or to present any evidence concerning it at the trial?

Petitioners have claimed that they are worried about the financial well-being of DFW, but this cannot be so for the following reasons:

A. Prior to the opening of DFW, Southwest conducted 8,952 out of a total of 304,000 aircraft opera-

tions per year at Love. (R. 1240; 1388) This is 2.9%. Southwest enplaned 140,464 passengers out of a total of 5,816,250 enplanements per year at Love. (R. 1387; 4421) This is 2.4%. In projecting future airport requirements for the Dallas area, the Airport Board missed its forecast of enplanements at Love during 1972 by 2,272,000 passengers. (R. 1232) Southwest's total enplanements of 140,464 are only 6% of this mistake. Southwest would deflect $400,000 in revenues from DFW to Love each year, as compared with a total revenue projection for DFW, in 1975, of $43,400,000. (R. 3600-03) This is nine-tenths of one percent (.009). DFW is a nine-mile long, 17,520 acre, $600,000,000 facility. (R. 4364-65; 5575) Southwest operated three, and now operates four, airplanes. (R. 1282)

B. The Cities presented an Exhibit supposedly showing that $3,593,000 in revenues per year would be lost at DFW if Southwest stayed at Love. (R. 4361-63). This conclusion was premised upon the false assumption that all of the CAB air carriers would retain intrastate air service at Love in order to compete with Southwest for intrastate traffic to Texas cities not even served by Southwest and over routes where it does not compete with such carriers. (R. 4361-63) Ignoring the illogic of this Exhibit, it may be noted that under any factual hypothesis contained therein the Exhibit shows DFW receiving an amount of revenue necessary to cover *all* of its costs and expenses, *regardless of what Southwest and the CAB carriers do.* (R. 4361-63; 1203) This is simply because the CAB air carriers, through their Letter Agreements, have undertaken to pay any and all deficits at DFW, including 1.25 times annual debt service on the DFW Revenue Bonds, and their guarantee is backed by $150,000,000 in an-

nual net revenues before taxes (more now, since Delta Airlines alone has just reported a record $94,000,000 profit). (R. 1209; 1327; 1722) The Finance Director for the Airport Board admitted that all eight CAB underwriting air carriers would have to become bankrupt and go out of business before DFW could lose one penny of revenue as a result of Southwest's remaining at Love. (R. 1723-24)

C. First Southwest Company, an investment banking concern, is financial adviser to DFW. (R. 1813; 5390-95) On March 10, 1972, it vouchsafed its professional opinion that Southwest's absence from DFW would not be a fact of any material significance with respect to $112,000,000 of DFW Revenue Bonds to be issued on March 29, 1972. (R. 5396-97) Thomas Sullivan, the Executive Director of the Airport Board and its Chief Executive Officer, delivered himself of the same opinion in a letter of March 16, 1972. (R. 5398-5400) The Official Statements issued in connection with subsequent DFW bond offerings contained similar representations upon which bond underwriters and the investing public were entitled to rely. (R. 5401-5613) Mr. Decker Jackson, President of First Southwest Company, stated during his testimony that Southwest's remaining at Love was immaterial to the financial well-being of DFW. (R. 1885)

Forcing Southwest to DFW is clearly contrary to considerations of public convenience and necessity and unnecessary to assist DFW with its existing financial deficits. What, then, supplies the motive for bringing this case before the Supreme Court of the United States? The answer may be found in Dallas' answer to Southwest's interrogatories nos. 16 and 17, which together ask in what respect, if any, Southwest's remaining at Love would impair Petitioners' ability to

"manage, control and discharge the bonded indebtedness for the Dallas-Fort Worth Regional Airport?"

> ". . . Loss of access to numbers of enplaning passengers of this magnitude to *air carriers* operating out of the Dallas-Fort Worth Regional Airport over the same intrastate routes, and the loss of the supplemental revenues anticipated from the use by these passengers of Dallas-Fort Worth Regional Airport parking facilities and other concessions, could well jeopardize the ability of *air carriers* operating at the Dallas-Fort Worth Regional Airport to pay the contracted rentals, fees, and charges, and such competitive operation of airports contrary to the contracts and ordinances of the Cities of Dallas and Fort Worth would impose insurmountable burdens upon *such carriers.*" (emphasis added) (R. 1803-06)

As has been demonstrated above, the answer is fallacious in and of itself, but it does show Dallas' preoccupation with the self-interest of the CAB air carriers, rather than with the desires and convenience of that segment of the public represented in the person of the short haul, commuter air passenger. It is true that the CAB air carriers have incurred liabilities in building their transcontinental airport to suit their own convenience and economies. This does not, however, signify that Southwest should perish in order to provide a small and temporary palliative for their transient economic woes at DFW.

REASONS FOR DENYING THE WRIT

Under the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq., the FAA regulates matters pertaining to safety, including the use of the navigable airspace. But this case does not involve safety or use of the navigable airspace. Under the Federal Aviation Act of

1958, the CAB, in the interest of public convenience and necessity, governs the service of particular airports by interstate air carriers. But this case does not involve an interstate air carrier. Instead, this case involves economic regulation of an intrastate carrier by the TAC, pursuant to power expressly preserved in the states by the Federal Aviation Act of 1958 and reserved to the TAC by State law. Neither the FAA, the CAB, nor the City of Dallas may determine the routes of Southwest Airlines, of which service to Love Field is an integral part. The Federal Airport Act, ch. 251, 60 Stat. 170 (1946) and its successor, the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701 et seq., do not disrupt the Federal-state regulatory scheme ordained by the Federal Aviation Act of 1958. These 1946 and 1970 Acts merely establish guidelines and eligibility standards for the granting of Federal aid to local airport projects upon application for such aid by local interests. The facts and applicable law in this case bear no relationship to the facts and issues implicated in *Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 and in *United States* v. *City of New Haven*, 496 F.2d 452 (2nd Cir. 1974).

The decision below is correct; there are no conflicts in decision or principle with other cases; and, certainly, there are no special and important reasons for granting a writ herein.

ARGUMENT

I

THE DECISION BELOW IS CLEARLY CORRECT

The United States District Court for the Northern District of Texas did not grant Southwest the right to serve Love Field "in perpetuity." It ordered and declared that *Dallas* could not exclude Southwest from the use of such airport, a publicly owned, financed, and operated facility, "so long as Love Field remains open as an airport." (Pet. App. 38b)

The United States Court of Appeals for the Fifth Circuit affirmed, holding that the TAC, in the interest of statewide public convenience and necessity, had, under the facts of this case, sole power to determine whether or not Southwest should serve Love. This decision is eminently correct since neither the CAB nor the FAA has any role to play herein, and the authority of the TAC is paramount to that of Dallas under Texas law.

The classic axiom of the basic government course is true: the CAB operates in the field of economics and the FAA in the realm of safety. Subchapter IV of the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1371 et seq., sets forth the substantive regulatory powers of the CAB. It is entitled "AIR CARRIER ECONOMIC REGULATION." Subchapter VI of the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1421 et seq., sets forth the substantive regulatory powers of the FAA. It is entitled "SAFETY REGULATION OF CIVIL AERONAUTICS." In the creation of the Department of Transportation, the functions, powers, and duties of the preexisting Fed-

eral Aviation Agency were transferred to the Secretary of Transportation:

> "*Provided, however*, That there are hereby transferred to the Federal Aviation Administrator, and it shall be his duty to exercise the functions, powers, and duties of the Secretary *pertaining to aviation safety* as set forth in sections 306, [etc.] of the Federal Aviation Act of 1958, as amended." (emphasis added) 49 U.S.C. Sec. 1655(c)(1).

49 U.S.C. Sec. 1405 sets forth in summary form the basic powers and duties of the Administrator with respect to safety of civil aircraft in "air commerce." His jurisdiction extends to intrastate flights by virtue of 49 U.S.C. Sec. 1301(4), which defines "air commerce" to mean, *inter alia*, "any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce." Thus, with respect to safety, Southwest is regulated by the FAA in exactly the same manner as the CAB trunk and regional air carriers.

49 U.S.C. Sec. 1432, first enacted in 1970, sets forth the only regulatory powers of the FAA with respect to airports, as such. This provides that the Administrator is empowered to issue airport operating certificates to airports serving air carriers certificated by the Civil Aeronautics Board and to establish minimum safety standards for the operation of such airports. Love Field, of course, qualifies, since, up until DFW's opening on January 13, 1974, it was the seventh most active airport in the world. (R. 970) It is also presently served by one CAB carrier, TI, which offers flights only between Love and Austin, Texas. As stated

by Mr. Henry L. Newman, Director of the Southwest Region for the FAA:

> "Q. Mr. Newman, to get one thing out of the way quickly, you're not saying that Love Field was an unsafe airport back in 1963 and you're not saying it is unsafe today?
> "A. That's correct. . . ." (R. 586)

Pursuant to its regulatory authority over safety matters, the FAA also controls use of the navigable air space, which is defined as "airspace above the minimum altitudes of flight prescribed by regulations under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. Sec. 1301(24). When the air space surrounding an airport is on the verge of undue congestion, the FAA eliminates the problem through a "flow control exercise" which spaces the departure and arrival of flights. There are, of course, no air space problems at Love or in the Dallas/Fort Worth area as a whole. Love accommodates 110 to 115 IFR operations per hour and served the entire airline industry prior to the opening of DFW, which now provides an additional capacity of 117 IFR operations per hour. (R. 623; 551) With or without Southwest, Love remains open to its full capacity for service by all types and sizes of aircraft engaged in both commercial and general aviation. (R. 970-73; 1237-47)

As far as commingling of commercial and general aviation is concerned, Petitioners seek to leave the impression that, for some imperative reason of overriding national significance, DFW is restricted to commercial and Love to general aviation uses. Nothing could be further from the truth, since such a division is

neither sanctioned by law nor effectuated in fact. DFW is open to all types of aeronautical uses and services "because if for no other reason than we have received Federal aid." (R. 903) This statement was made by Mr. Thomas Sullivan, Executive Director of DFW, who is a man of "considerable standing" in the field of airport development and management. (R. 700) Love has also received Federal aid, and Mr. Newman testified that, as to commercial versus general aviation: "As far as the FAA is concerned, both types of traffic are safe and we encourage and strongly support both means of travel of aviation." (R. 913)

As Southwest's Statement of the Case clearly demonstrates, DFW was constructed to promote the economic well-being of the CAB air carriers, acting in conjunction with the Cities. The CAB provided the catalyst through its Order threatening to amend its certificates so as to require CAB air carrier service through only Love or GSIA, but this was premised on considerations of public convenience and necessity rather than of safety. As admitted by Mr. Newman:

> "A. I guess I must answer probably had the Board not made that determination, there would not be a Regional Airport under construction, and we [the FAA] would not have had the requirement to put it in." (R. 581)

Since this matter does not involve air safety or airspace regulation in any conceivable way, shape, or form, the FAA has no jurisdiction and is eliminated as a concerned regulatory body.

The CAB has traditionally exercised the right to designate a particular airport as a point of service in connection with the administration of its route making authority, and this right has consistently been up-

held by the courts as essential to the proper economic regulation of CAB air carriers. *City of Dallas* v. *CAB*, 221 F.2d 501 (D.C. Cir. 1954), *cert. denied* 348 U.S. 914; *Airport Commission of Forsyth County* v. *CAB*, 300 F.2d 185 (4th Cir. 1962); *Outagamie County* v. *CAB*, 355 F.2d 900 (7th Cir. 1966).

The CAB's jurisdiction under the Federal Aviation Act of 1958 extends only to carriers engaged in interstate air transportation, however, and not to a carrier such as Southwest, which is solely engaged in intrastate air service. *Braniff Airways, Inc.* v. *CAB and Southwest Airlines Co.*, 473 F.2d 1150 (D.C. Cir. 1972); *Texas Aeronautics Commission and Southwest Airlines Co.* v. *Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. Sup. 1970), *cert. denied* 400 U.S. 943; *Dower* v. *United Airlines*, 329 F.2d 684 (9th Cir. 1964); *United Airlines* v. *Public Utilities Commission*, 37 Cal.2d 1 (1952), *appeal dismissed for want of a substantial federal question*, 342 U.S. 908. The Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 was very specific and clear on this point, and the preservation of the dual Federal-state airline regulatory system constitutes a deliberately adopted, firmly entrenched policy of the Congress:

> "Attention has been called to numerous recommendations and bills presented to Congress, prior to and since the enactment of Civil Aeronautics Act of 1938, seeking to extend Federal economic regulation to include intrastate operations of air carriers, and also to the fact that none of these has been enacted into law. [Citing Reports.] This would seem to strengthen the conclusion that Congress has not assumed control over [even interstate] carriers to the exclusion of State control as to their intrastate rates." *People* v. *Western Air-*

lines, 42 Cal.2d 621, 268 P.2d 723, 737 (Cal. Sup. 1954), *appeal dismissed for want of a substantial federal question*, 348 U.S. 859.

Of course, Congress reaffirmed this policy when it adopted the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq., preserving the same dual regulatory system as created in 1938.

Petitioners concede on page 51, footnote 30, of their Petition that: "In effect, the TAC is the CAB of Texas." As such, the TAC has equivalent powers to designate the airports to be served by its intrastate carriers. This, as Mr. Newman admitted, is essential:

> "A. The FAA has no function as far as designation of routes, whether intrastate or interstate, our only concern that involves the intrastate part of it is the safety aspect.
>
> "Q. Within the state or purely intrastate traffic, a coherent, systematic plan is necessary, just as it is within the nation, is it not?
>
> "A. That's correct." (R. 156-57)

At the trial herein, Mr. Newman frankly acknowledged that, with FAA approval, the Cities were attempting to exercise route making authority over Southwest, although he conceded the CAB would have this power as to interstate carriers and that, "intrastate or interstate, our only concern is the safety aspect." (R. 949; 586-87) The Cities, in turn, admitted that they claimed the power to determine public convenience and necessity with respect to Southwest, although their pleadings relied on exclusive CAB jurisdiction. (R. 919; Resp. App. D) Evidently, all of the Petitioners, and Mr. Newman, deemed preemption by the FAA of route making authority under the 1946 and 1970 airport grant statutes as an absurdity. (R.

588-89) They did not plead this contention nor present any evidence with respect thereto.

The Cities cannot usurp the powers of the TAC under Texas law, just as they cannot usurp the powers of the CAB under Federal law. There is an equally compelling demand for uniformity within each system in order to prevent chaos in either interstate or intrastate air transportation.

The Texas Constitution, Art. 11, Sec. 5, provides that Dallas, a creation of the State, may enact only ordinances which do not ". . . contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. . . . ." Vernon's Ann. Civ. St. Art. 1165 sets forth an identical prohibition.

Under the Municipal Airports Act cited by Petitioners, Vernon's Ann. Civ. St. Art. 46d-1 through 46d-22 (Pet. App. D), Texas has expressly granted Dallas certain powers to regulate airports. These powers are, however, specifically circumscribed by the same Act:

> "(b) Conformity to Federal and State law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States *or laws of this State*, or *to any regulations promulgated or standards established pursuant thereto.*" (emphasis added) Art. 46d-7(b).

The opinions of the District Court and Court of Appeals herein (Pet. App. A & B) succinctly and conclusively set forth why Dallas' 1968 Ordinance is inconsistent with the Texas Aeronautics Act, Vernon's

Ann. Civ. St. Art. 46c-1 et seq., which preempts the intrastate field by delegating to the TAC the sole and exclusive authority to determine airport points of service in the interest of an "intrastate air transportation system" serving the public convenience and necessity of all of the citizens of Texas; with Southwest's certificate of public convenience and necessity which authorizes it to serve Dallas through "any" airport in the area and which is identical, in effect, to the unamended CAB certificates permitting the CAB carriers to use Love or any other airport, as they have done since the opening of DFW; and with Minute Order No. 22 of the TAC which forbids Southwest to change airports without prior approval by the TAC. *City of Arlington* v. *Lillard*, 116 Tex. 446, 294 S.W.2d 829 (Tex. Sup. 1927); *City of Fort Worth* v. *Lillard*, 116 Tex. 509, 294 S.W. 831 (Tex. Sup. 1927); *National Airlines, Service to Fort Lauderdale*, 41 CAB 85,108 (September 18, 1964); *Op. of Texas Atty. Gen.*, September 2, 1969 (Texas Aeronautics Act "subordinates, so far as for-hire air transportation is concerned, the general power of cities to regulate commerce within their boundaries").

Petitioners denigrate the TAC, which is currently supervising the FAA's Texas airport system planning and which has provided far better air service at lower fares for the people of Texas, and impliedly suggest that the Cities and the FAA are better judges of public convenience and necessity. This is somewhat incongruous in light of the evidence herein that neither the Cities nor the FAA paid any attention to public convenience and necessity and that the Cities, at least, would willingly and thoughtlessly destroy Southwest's competitive air service solely for the economic benefit

of the CAB air carriers, who have now kept Southwest locked in continuous litigation for almost seven years.

More specifically, Petitioners collaterally attack the adoption of Minute Order No. 22, which is the equivalent of Sec. 202.3 of the CAB Regulations providing that a CAB air carrier may not switch airports without notice to the CAB, nor without a hearing if the CAB finds that the proposal may be adverse to the public interest. *Flying Tiger Line, Inc., Air Truck Service*, 30 CAB 242, 243 (f.n. 1) (November 12, 1959). Minute Order No. 22 is a general regulation of the TAC applying to all Texas intrastate carriers, and, under both Texas law and the United States Constitution, no notice and hearing is necessary prior to the adoption of such administrative "legislation." *Bowles* v. *Willingham*, 321 U.S. 503; *Greer* v. *Railroad Commission of Texas*, 117 S.W.2d 142 (Tex.Civ.App.—Austin 1938, writ dism'd). If Petitioners wished to challenge Minute Order No. 22, they had, but have not exercised, the right to do so under Art. 46e-6, Subd. 3(e) of the Texas Aeronautics Act, Vernon's Ann. Civ. St., and Rule 49 of the Rules of Practice and Procedure of the TAC. Additionally, there is no evidence that Petitioners did not receive and the opportunity to be heard.

Petitioners also assert that Southwest's service to Love Field creates an undue burden on interstate commerce. This cannot be so since Southwest carries no freight or passengers in interstate commerce. It carries solely intrastate passengers and freight pursuant to authority granted by the TAC, in the exercise of powers preserved to it by the Federal Aviation Act of 1958. Petitioners do not like Southwest's competition with the CAB air carriers, but this competitive effect

hardly compares with the state burdens imposed by setting rates for intrastate passenger travel and freight shipments on interstate railroads (*Simpson* v. *Shepherd*, 230 U.S. 352); and taxing the full, unapportioned value of airplanes used in interstate commerce by a domiciliary interstate air carrier (*Northwest Airlines* v. *Minnesota*, 322 U.S. 292).

Before the District Court and on appeal, Petitioners contended they were entitled to declaratory relief because, as Home Rule cities under Texas law, they, rather than the TAC, possessed the authority to determine whether Southwest should be permitted to utilize Love Field. Both the District Court and Court of Appeals having decided against them on this issue, Petitioners now adopt the extraordinary position before this Court that the Court of Appeals exceeded the proper scope of judicial review by deciding the very questions of state law urged upon it by Petitioners.

A Federal court, having properly obtained jurisdiction, has the right to decide all the questions in a case. In many instances, in fact, it may be preferable to decide the case by construing a state statute rather than unnecessarily deciding the various constitutional questions appearing in the record. *Silver* v. *Louisville & Nashville Railroad Co.*, 213 U.S. 175.

Petitioners, however, maintain that the abstention doctrine enunciated by the Court in *Railroad Commission of Texas* v. *Pullman*, 312 U.S. 496, required the Court of Appeals to decide this case on the basis of Federal, rather than state, law. The *Pullman* case and its progeny evidence no such preference. Under the abstention doctrine, the Federal court refrains from exercising jurisdiction *at all* in circumstances in which

a state court could dispose of the case by ruling on a controlling question of state law; Federal-state conflict is thus avoided by having the Federal court abstain from reaching any constitutional issues. Since the doctrine involves duplication of effort and expense and an attendant delay, in the absence of special circumstances it "is not to be used to impede the normal course of action where federal courts have been granted jurisdiction in the controversy." *Propper* v. *Clark*, 337 U.S. 472, 492. Surely the Petitioners, having initiated this entire litigation by invoking the jurisdiction of the Federal courts, cannot seriously ask this Court to order the lower courts to abstain from this controversy, especially since Petitioners have alleged no reasons to justify the non-exercise of Federal jurisdiction.

The issues involving Texas law were thoroughly briefed and argued on the merits and were presented on a clear and complete record at the trial and appellate level. The rulings on these issues were made by a Texas Federal judge of long experience and by a Circuit Court which is constantly required to pass upon questions of Texas law. The author of the appellate decision, Judge Gee, possesses extensive experience in Texas jurisprudence as a resident and attorney of that state. Petitioners having failed to demonstrate that the lower courts' interpretation of local law is unreasonable, the Court should decline to review such decisions made by Federal courts skilled in the law of Texas. See *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280.

Recognizing that the FAA as a regulator of safety, the CAB as a regulator of only interstate air transportation, and Dallas as a non-regulator cannot supersede the TAC and displace Southwest from Love, Petition-

ers attempt to salvage their case before the Supreme Court of the United States by invoking the non-pleaded doctrine of preemption under the Federal Airport Act, ch. 251, 60 Stat. 170 (1946) and the Airport and Airway Development Act of 1970, 49 U.S.C. Sec. 1701 et seq. Both of these Acts provide only for grants in aid of local airport development and neither of them confers any regulatory powers upon the FAA. The Federal Airport Act of 1946 ("the 1946 Act") will be first examined because DFW received its initial grants and "long term" FAA commitment under this Act, and its scheme for local airport development is identical in all relevant aspects with that of the Airport and Airway Development Act of 1970 ("the 1970 Act").

The 1946 Act provides that the Administrator of the then Federal Aviation Agency (hereinafter "FAA" interchangeably with the Federal Aviation Administration) shall prepare a National Airport Plan for the development of a system of public airports adequate to anticipate and meet the needs of civil aeronautics, and that each fiscal year the Plan shall be revised and the proposed program of airport development publicly announced, although the Administrator "may revise such program to the extent he finds necessary." 49 U.S.C. Sees. 1102-03. Any public agency, or several acting jointly such as Dallas and Fort Worth, may file a project application for Federal funds, but this may not propose any airport development other than that "included in the then current revision of the national airport plan formulated by the Administrator under this chapter." 49 U.S.C. Sec. 1108(a).

Nothing in the 1946 Act "shall authorize the submission of a project application by any municipality . . .

which is subject to the law of any State if the submission of such project application . . . is prohibited by the law of such State." 49 U.S.C. Sec. 1108(b). The project will be approved by the Administrator only if he is satisfied, *inter alia*, "that the public agency or agencies which submitted the project application have legal authority to engage in the airport development as proposed." 49 U.S.C. Sec. 1108(d)(1). Public hearings are afforded only "with respect to the *location* of any airport the development of which is proposed." (emphasis added) 49 U.S.C. Sec. 1108(e).

As a condition precedent to his approval of a project, the Administrator must receive satisfactory assurances in writing: (1) that the airport involved will be available for "public use on fair and reasonable terms and without unjust discrimination"; (2) that it will be "suitably operated and maintained"; (3) that the "aerial approaches" will be safe; (4) that the airport will be available for use "by military and naval aircraft"; (5) that the sponsor will furnish space for Federal activities such as "air traffic control"; (6) that accounts and records will be kept in accordance with a prescribed system of accounting; (7) that the owner or operator will submit such financial and operations reports as are reasonably requested; and (8) that all airport records will be available for inspection upon reasonable request. 49 U.S.C. Sec. 1110.

Upon approving a project, the Administrator shall transmit an offer to the sponsor to pay the United States' share of the project costs, which "shall be made upon such terms, and subject to such conditions, as the Administrator may deem necessary to meet the requirements of this chapter and the regulations prescribed thereunder." Each such offer "shall stipulate the ob-

ligations to be assumed by the sponsor or sponsors of the project," and, upon acceptance, "shall comprise a grant agreement constituting an obligation of the United States and of the sponsor or sponsors so accepting." 49 U.S.C. Sec. 1111.

The 1966/1967 National Airport Plan for FY 1968-1972 states, on page eleven, that: "National airport planning requires the advice and participation of other Federal agencies in order to insure the compatibility of airport development . . . with airline service regulatory decisions." Under the heading "COORDINATION WITH THE CIVIL AERONAUTICS BOARD," contained on page twelve, it recites:

> "The interrelationship of the responsibilities of the CAB and the FAA concerning airports emerges from the mandate of the Federal Aviation Act of 1958 to encourage and develop an air transportation system properly adapted to current and future needs of air commerce. *The Board is empowered to determine which communities shall receive airline service and to regulate the airline route structure to meet this public need. In this connection, the Board may designate the airport through which airline service is to be provided to a community. Generally, the Board leaves the selection of the airport to airline management as long as it satisfies the public convenience and necessity.* The FAA is charged with the development of a national system of airports to anticipate and meet the needs of civil aeronautics. *Since the composition of the airport system is in substantial measure based on the requirements imposed by the operation of the airline aircraft fleet, it is essential that the Plan be based on a thorough knowledge of the locations being served by air carrier aircraft and their projected future public service.*

> *The interrelationship of certificate authority and airport capability, therefore, dictates that the FAA and CAB coordinate their respective activities. . . .*" (emphasis added)

The FAA thus concedes that under the 1946 Act, as well as under the 1970 Act, it has no power to govern service of airports by airlines. See also, to the same effect, the narrative preceding the *1972 National Airport System Plan*, Volume AAS. By Congressional edict, this power resides in the CAB with respect to interstate air transportation and, although ignored in the FAA's narrative, in the TAC with respect to intrastate air transportation. The notation on page 186 of the 1966 67 Plan, "To Ultimately Accommodate All Airline Service," merely identifies DFW's proposed "principal role" (p. 39); is not intended to have any regulatory effect; and is obviously based on the unfounded assumption that the CAB would carry out its interlocutory order in the Dallas-Fort Worth Regional Airport Investigation and amend the certificates of its air carriers so as to require them to provide all Dallas Fort Worth service through DFW.

Order No. 5190.6, "Airports Compliance Requirements," adopted by the FAA on August 24, 1973, three years after enactment of the 1970 Act, also makes perfectly clear the limited role of the FAA as an airport grant program administrator:

> "1. GENERAL. The airport compliance function is not regulatory. It does not attempt to control and direct the operation of airports. . . .
>
> "Such grants were made in exchange for binding commitments designed to assure that the public interest would be served. The FAA bears the

important responsibility of seeing that these commitments are met. . . ." P. 1.

* * *

"4. SOURCES OF OBLIGATIONS. The obligations that airport owners assume in consideration of Federal aid flow from the following agreements and statutes which are described in Chapter 2.

"a. Grant agreements issued under the Federal Airport Act of 1946 or the Airport and Airway Development Act of 1970." P. 2.

* * *

"SECTION 1. THE FAA COMPLIANCE PROGRAM

"76. BASIS AND OBJECTIVES. . . . FAA airports personnel must make it clear to airport owners that they do not seek to enforce a regulation but to administer a contract in the interests of civil aviation. . . ." P. 71.

Thus, the FAA concedes that it has no regulatory authority at all under either the 1946 or 1970 Acts and that its sole responsibility is to enforce contractual commitments undertaken by sponsors pursuant to such Acts.

Finally, as it emerged from Committee in both the Senate and the House, the original version of 49 U.S.C. Sec. 1716(f), part of the 1970 Act, would have empowered the Secretary of Transportation, under certain circumstances, to select sites for additional airports in metropolitan areas. Other sites would be ineligible for Federal funds as long as the Secretary's designation remained outstanding, and this was the only coercive imposition on local interests under the Act as proposed. Nevertheless, even this was too strong for the House and Senate, which jointly amended 1716(f) to its present form: "In order to facilitate the selection of a site for an additional airport under the preceding sentence, the Secretary shall

exercise such of his authority under this subchapter as he may deem appropriate to carry out the provisions of this paragraph." His "authority under this subchapter" was variously described by the Senate and House sponsors of the amendment as "to persuade and influence" but not to interfere with "the basic responsibility" of "the governing local authorities;" "to seek to use persuasion;" and "to help facilitate a decision." 116 Cong. Rec. 4869; 115 Cong. Rec. 33278. See also 116 Cong. Rec. 4869-70 and 5035.

It is obvious that the 1946 Act and the 1970 Act are in no sense regulatory enactments intended by Congress to preempt any field. They are simply grant statutes setting forth the conditions upon which aid will be rendered to local bodies in the development of their airports. The Acts do not even operate except upon the initiative of a local public agency in applying for funds. If such public agency does not comply with the Acts, Federal funds are denied, but it can proceed to undertake and complete any development it wishes with its own resources. The National Airport Plan and the National Airport System Plan are just that—plans, without any affirmative effect at all. Their sole purpose is to assure that Federal funds, if granted, will be employed in an orderly manner consistent with a national scheme and not be squandered on individual projects without priority ranking or interrelationship. Such Plans are also, of course, designed to lure public agencies into making specific improvements by holding forth the promise of Federal funds if certain projects are undertaken rather than others. But it is undeniable that such Plans serve only as guidelines for Federal expenditures, and no more.

The FAA did not impose any restrictions upon the use of DFW in its grant agreements and certainly

could impose none upon Love Field, which was not the subject of the grants. The FAA Administrator constantly revises the National Airport System Plan and enters designations as to the anticipated, future "principal role" of an airport. But this is done without notice or hearing and on the basis of information furnished *to* him; not on the basis of any independent factual determination made *by* him. For instance, the 1970 National Airport System Plan lists Love as a Basic Transport Airport (*designed* for 60,000 pounds maximum gross weight) for five years and then a General Transport Airport *designed* to accommodate aircraft up to 175,000 pounds. Volume AAS, p. 25. This is despite the fact that Love has just ceased serving as the sole commercial aviation airport in the Dallas/Fort Worth area, receiving, every day, 747's, DC-10's, and L1011's weighing over 300,000 pounds, as it will continue to do in connection with charter operations, maintenance flights, unscheduled cargo flights and other commercial and non-commercial aeronautical activities sanctioned at Love by the 1968 Ordinance. As stated on page 29, "Implicit in this process are *assumptions* about level of service and projected activity at airports included in the NASP." The 1972 National Airport System Plan also shows that no FAA approved Master, Metropolitan, Regional, or State Plan is yet in effect for Love Field, Volume ASW, Southwest Region, pp. 2 and 36, completely disproving that Love fulfills an assigned role in any local airport system plan yet evolved. Moreover, Sections 1711(4) and (5) of the 1970 Act define airport master and system planning as being only for "purposes of information and guidance."

Neither the 1946 Act nor the 1970 Act expressly preempts the field of route making in connection with airport grants. But Petitioners would have this Court be-

lieve that through these Acts Congress impliedly intended to do away with the dual Federal-state airline economic regulatory system it deliberately established in the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, persistently refused to change, and expressly reconfirmed in the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq., enacted twelve years after adoption of the 1946 Act. Furthermore, this modification of the entire Federal and state regulatory machinery was supposedly accomplished by mere grant in aid statutes, originally designed to last for only seven years and allegedly providing that airlines may be switched from airport to airport as the Administrator singlehandedly, and unbeknownst to them, periodically revises the National Airport System Plan by updating his files and making notations on pieces of paper.

Petitioners' contention exacts Federal-state uniformity in the field of airline service regulation, which the Congress has expressly determined requires Federal-state diversity; it predicates preemption upon a non-regulatory and totally non-pervasive scheme designed solely to determine eligibility or ineligibility for Federal aid; and it converts a field in which Federal dominance has traditionally and specifically been rejected into a field where an agency never deemed to function, the FAA, suddenly exerts supreme Federal powers without any standards or procedures for doing so, all contrary to *Cooley* v. *Board of Wardens*, 12 How 299, 13 L.Ed. 996 and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218.

Finally, the unarticulated logic of Petitioners' preemption argument contains self-destructive incongruities. If the 1946 and 1970 Acts preempted the field of airport operations with respect to designating

airline service points, does the FAA now regulate intrastate air carriers and the CAB interstate air carriers? If so, can the FAA order its intrastate carriers to serve DFW while the CAB permits its interstate carriers to serve Love Field, or does this create forbidden unjust discrimination on the part of the Federal government? In the event of such a conflict, which now exists according to the Petitioners, does the FAA or the CAB prevail? Or perhaps the FAA's powers in this respect were intended by Congress to supersede those of the CAB, in which event are there to be two route hearings on every Federal application, one before the CAB to determine whether a city should be served and another before the FAA to determine which airport in that city should be served, if any? Suppose the CAB authorizes service to Chicago, but the FAA refuses to permit landings at any of its airports? Or perhaps the Congress intended the FAA to take over the CAB's entire route making authority but forgot to repeal Title IV of the Federal Aviation Act of 1958? And what of the remaining role of the States, if any? Does the TAC regulate all aspects of Southwest's operations except airport service points, which are regulated for intrastate carriers by the FAA and for interstate carriers by the CAB? Should Southwest have simultaneously applied to the TAC for authority to carry only Texas intrastate passengers to and from Dallas and to the FAA for permission to enplane and deplane them at Love Field, the only airport suitable for a strictly short haul commuter carrier?

Petitioners' preemption argument is completely unfounded and, if accepted, would make hash of a finely crafted Federal-state regulatory scheme. The District Court and the Court of Appeals properly rejected this bizarre argument and their decisions are correct.

II

THERE IS NO CONFLICT OF DECISION

Petitioners assert that the decision below is in direct conflict with *United States* v. *City of New Haven*, 496 F.2d 452 (2nd Cir. 1974), *appeal filed sub nom. Town of East Haven* v. *United States*, 43 U.S.L.W. 3124 (U.S. July 30, 1974, No. 74-37), *appeal dism'd and cert denied*, 43 U.S.L.W. 3255 (October 29, 1974). The two cases are completely unrelated.

To insure safe landings and takeoffs, FAA regulations require that the ground level area beyond the runway be clear of all structures that might interfere with low-flying aircraft. To provide such a "clear zone," New Haven purchased additional land, which was located in the neighboring Town of East Haven.

The Superior Court of Connecticut held that this land acquisition violated state law because New Haven had failed to obtain East Haven's permission prior to acquiring its land. On that basis, the Superior Court enjoined the expansion of the airport over East Haven with respect to the "maintenance of clear zones." The United States then instituted suit in the United States District Court for the District of Connecticut seeking to enjoin enforcement of the state court order, to the extent that it regulated the flight of aircraft through the navigable airspace. The District Court granted a preliminary injunction, which was affirmed in *City of New Haven*. Thereafter, the preliminary injunction was made permanent.

The state court's order forced New Haven to close a portion of its Federally-financed runway. Consequently, pilots of Eastern Airlines refused to fly jet aircraft into or out of Tweed-New Haven Airport.

(Ct. App. Appendix 40a) A more drastic interference with the FAA's power to regulate the navigable airspace in the interests of safety can hardly be envisioned.

Congress has enacted a detailed and comprehensive system of air traffic regulation. In the Federal Aviation Act of 1958, 49 U.S.C. 1301 et seq., Congress expressly stated that the United States possesses and exercises "complete and exclusive national sovereignty" in its airspace. 49 U.S.C. 1508(a). "Navigable airspace" is defined to include "airspace needed to insure safety in take-off and landing of aircraft." 49 U.S.C. Sec. 1301(24). This constitutes the "clear zone." To the extent, therefore, that the state court order regulated, and interfered with, the flight of aircraft through the navigable airspace, it clearly violated the Supremacy Clause. *United States Constitution*, Art. 6, cl. 2.

The decision in *City of New Haven* in no way relies on preemption under either the Federal Airport Act, ch. 251, 60 Stat. 170 (1946) or the Airport and Airway Development Act of 1970. 49 U.S.C. Sec. 1701, et seq. It in no way involves economic regulation of points of service by air carriers. It is in no way related to the issues in this case. Instead of establishing "complete and exclusive national sovereignty" in the regulation of air carrier service, Congress has intentionally and specifically ordained that the CAB shall determine and regulate the routes of interstate air carriers and that the states shall perform the identical function with respect to intrastate airlines.

Petitioners also claim that there is at least a conflict in principle with the decision of this Court in *Burbank*

v. *Lockheed Air Terminal*, 411 U.S. 624. This is also insupportable.

Burbank involved the power of the City to enforce an ordinance imposing a curfew on take-offs of pure jet aircraft at Hollywood-Burbank Airport. The purpose of the ordinance was to eliminate jet aircraft noise between the hours of 11 p.m. and 7 a.m. Although the majority touched upon regulation of the use of navigable airspace (as to which there are no problems at either Love or DFW), it concentrated upon the pervasiveness of the Congressional scheme enacted in the Noise Control Act of 1972, 49 U.S.C. Sec. 1431, in finding preemption. The dissent concluded that Congress had not intended to preempt and that, in any event, the FAA had not occupied the field with any pervasive or conflicting noise control regulations.

Under the 1946 and 1970 airport aid Acts relied upon by Petitioners, the FAA has only the power to determine eligibility; to enter into grant agreements; and to police the observance of those agreements. It does not have the power to regulate the use of navigable airspace; to adopt regulations pertaining to air carriers; or to control airport operations and usage in any manner. Not only is there no pervasive scheme, there is no regulatory scheme at all, and the FAA has never attempted to adopt one, expressly recognizing the non-existence of any regulatory power on its part. This case concerns only state regulation of airline economies in the interest of public convenience and necessity, a field which Congress has expressly declined to preempt.

III

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

1. The only evidence in the record of any "authoritative" FAA attitude towards Love Field service by scheduled carriers consists of a purported conversation between Gen. McKee, the FAA Administrator in 1965, and Mr. Henry L. Newman, FAA Director for the Southwest Region. Moreover, Petitioners' claim of preemption under the 1946 and 1970 Acts is not invoked in their pleadings. (Resp. App. D) Thus, the record hardly justifies review by this Court of Petitioners' preemption argument. Even if the Court should feel it probable that the 1946 and 1970 airport aid Acts impliedly repealed or modified the dual Federal-state regulatory system set forth in the Federal Aviation Act of 1958, the only result would be an inconclusive remand for further trial on the issue. See *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274.

2. The only public interest factor in this case requires the maintenance of Southwest's service at Love so that it can continue to provide superior air service at lower fares and not be expunged by the CAB air carriers. These carriers are underwriting all DFW deficits so that the financial well-being of their airport and of the citizens of Dallas and Fort Worth is not affected by the outcome of this matter. A clear distinction must be made between the financial interests of the CAB air carriers and the welfare of the public as reflected in public convenience and necessity determinations.

3. Petitioners fail to specify the manner in which the result in this case will affect other airport projects.

Additionally, the Airport and Airway Development Act of 1970 was funded for only five years and will be reviewed, and possibly changed or repealed, by Congress in 1975. Therefore, any decision as to its meaning and effect may have little precedential value. Furthermore, the Secretary of Transportation has announced that DFW will be the last "super airport" project and that increased use of Love should be encouraged. DOT and FAA obviously regard this case as of little consequence, since neither of them have ever attempted to intervene and be heard herein.

Petitioners' stated concern is that Southwest's CAB competitors, Braniff and TI, may be induced to provide service from Love as a result of Southwest's remaining there (the so-called "domino theory"). American and Delta Airlines are presently suing Petitioners, as well as Braniff and TI, in the United States District Court for the Northern District of Texas in order to enforce the intent of the Letter Agreements requiring each CAB air carrier to transfer all of its scheduled air services to DFW, and the trial is scheduled for February 10, 1975. If American and Delta are successful, as they should be, the outcome of this case in this Court will have little or no meaning even to the parties directly involved.

Petitioners' mistake was to ignore the TAC and to assume that only CAB action was required with respect to scheduled air carrier service. Presumably, this mistake will not be repeated by other airport sponsors in the future. This case simply does not involve any important principles stretching beyond the particular facts and parties involved.

4. Petitioners contend the 1946 and 1970 Acts preempt state action by the TAC. They ignore the dire

consequences flowing for them from acceptance of their argument. The FAA has never acted in an effective regulatory manner to ban Southwest from Love Field, so that Southwest may continue to serve that airport until it receives notice and hearing pursuant to which a final, adverse decision is rendered. But if TAC action is preempted, then so is the attempt by the Cities to regulate airport usage under their 1968 Ordinance and its later counterparts, pursuant to which over $400,000,000 in bonds were issued. These ordinances and, consequently, the bonds they authorized, would be invalidated along with Southwest's certificate and Minute Order No. 22. Even if the ordinances were severable, at the very least the bondholders would have an excellent action for rescission on the grounds that they had been misled by omission of information.

5. Assuming the Court agreed with the Petitioners as to the significance of their preemption argument, it would be unable to reach this issue as a basis for decision:

a. Petitioners claim that the CAB air carriers will suffer unjust discrimination if Southwest is permitted to serve Love while they must serve DFW. This claim is obviously fallacious since, if those carriers have lost their right to serve Love, it is only through their own, voluntary contractual undertakings (the Letter Agreements) and not as a result of any arbitrary fiat. As stated by Judge Taylor below: "If the potential user cannot, or does not, choose to avail itself of the 'opportunity' to use the airport, the airport operator is obviously not required to exclude those who can and do choose to use such facilities." (Pet. App. 126) It would, however, clearly constitute unjust discrimination against Southwest for the FAA to exclude it from

Love, when the CAB has expressly declined to take such action as to its own carriers. This is especially so since Southwest, as a strictly short haul commuter carrier, has most need for use of the close-in airport facilities.

b. Petitioners contend that if Southwest were excluded from Love, then only general aviation would be permitted to use that airport. This is untrue, as the record amply demonstrates. But even assuming its truth, such a restriction would not only constitute unjust discrimination against Southwest's passengers and its preferred commercial airline service, in favor of the less necessitous rights of general aviation, but would also violate the prohibition against the grant of an "exclusive right" to use of an airport, contained in the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1349(a). *Aircraft Owners and Pilots Ass'n v. Port Authority of New York*, 305 F.Supp. 93 (E.D.N.Y. 1969); 40 Op. A.G. 71 (June 4, 1941). The City of Fort Worth admitted in its brief to the CAB in the Regional Airport Investigation that it was illegal to exclude even less preferred general aviation from an airport, and the Executive Director of DFW has conceded that this is so, which is the reason why general aviation will be permitted to use the DFW facilities. (R. 4896-99; 843)

c. Three series of Love Field Airport Revenue Bonds, of which approximately $9.5 million are outstanding, provide that while any of them remain unpaid, Dallas "will continue to operate and maintain . . . the Airport as an airport for the accommodation of scheduled airlines serving the City . . . ." (R. 4476; 4575; 4657-58; 1861-62) Four series of Love Field Maintenance Base Bonds, of which some $25 million

are outstanding, provide that so long as any of such bonds remain unpaid "The City will continuously operate its Airport at Love Field, and will not cause or suffer curtailment of the general use thereof . . . ." (R. 4727; 4788; 4821; 4851; 1861-62) Dallas may not ignore or evade the restrictions of these covenants. *City of Houston* v. *Mann*, 164 S.W.2d 548 (Tex.Sup. 1942). Thus, insofar as the 1968 Ordinance is relied upon, as the only regulatory action ever taken by any governmental body to control use of Love, it is illegal Southwest is entitled to raise this issue because it owns both Love Field Airport Revenue Bonds and Love Field Maintenance Base Bonds, which constitute enforceable contracts between it and Dallas.

d. Even if the FAA did have regulatory powers under the 1946 and 1970 Acts and had exercised them through anomalous notations on the National Airport Plan or by delegation to Dallas, as Petitioners inferentially contend, its unilateral actions, without notice and hearing, would, as to Southwest and its passengers, violate the Administrative Procedure Act, 5 U.S.C. Secs. 554 and 556 and the Fifth and Fourteenth Amendments to the United States Constitution; 49 U.S.C. Sec. 1374(b); the equal protection clause; the right to travel; the right of access to the navigable air-space; and would discriminate against Southwest's passengers on the basis of wealth, as corporate jets could use downtown Love Field for their convenience, but not Southwest's reduced fare commuting public.

CONCLUSION

This case has nothing to do with airspace management, noise or safety matters, and thus has no relationship to the areas where this Court has concluded that

the FAA has been given preemptive powers. The 1946 and 1970 Acts relate only to the disbursement of Federal funds for local airport development upon application therefor by local agencies. The National Airport Plan and the National Airport System Plan, as revised from time to time by the Administrator of the FAA, have no regulatory effect and are simply guidelines for the expenditure of Federal funds in a systematic manner according to priorities established by the FAA.

DFW originated in the CAB's interlocutory decision that the new economies of jet aircraft, as linked to considerations of public convenience and necessity, required that its carriers serve only one airport in the Dallas Fort Worth area, rather than two airports but twelve air miles apart. Under the Federal Aviation Act of 1958, 49 U.S.C. Sec. 1301 et seq., however, the CAB can make these decisions only for interstate air carriers, and it has since concluded that not even they should be restricted to DFW. The power to determine public convenience and necessity for intrastate carriers, including, most specifically, the power to determine airport points of service, is expressly left to the states in which such carriers operate.

It is clear under Texas law that only the State, through the TAC, can determine issues of public convenience and necessity relating to the intrastate system of air transportation. If it were otherwise, 200 Texas cities with municipal airports would be enabled to fragmentarily regulate, and thereby destroy, the intrastate system, thus creating, within Texas, exactly the type of problem which the majority in the *Burbank* case visualized as resulting, on a national scale, from city curfew ordinances. Just as the Federal Aviation Act

of 1958 has preempted state control of interstate air transportation, so the Texas Aeronautics Act, Vernon's Ann. Civ. St. Art. 46c-1 et seq., has preempted city control of intrastate aviation. Unitary regulation under, respectively, the Federal and State Supremacy Clauses, is essential to the efficient functioning and integrity of both airline transportation systems.

This case involves no issue beyond the squabbling among the CAB air carriers as to their respective portions of DFW expenses, an airport which, for better or worse, they built to suit their own economic requirements and needs for transcontinental aircraft facilities.

For all reasons stated herein, Respondent Southwest Airlines Co. respectfully submits that a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Order No. E-18719

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C. on the 20th day of August, 1962

DOCKET 13959

In the matter of

DALLAS-FORT WORTH, TEXAS
REGIONAL AIRPORT INVESTIGATION

Order Instituting Investigation

The Civil Aeronautics Board has become increasingly concerned in recent months with the use or establishment of separate air carrier airports for service to cities which appear to warrant service through a common airport. The Board believes that in many such instances the use of multiple airports by the scheduled airlines tends to diminish the services to each airport and increase the cost of air transportation. Contrariwise, the concentration of services at one airport will often result in improved air service without serious ground service inconvenience to the users.

Our concern in this regard has already led to the institution of a series of investigations relating to consolidation of air services for specific areas at a single airport.[1] We have also undertaken in other situations to point to

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[1] *New England Regional Airport Investigation*, Docket 13494; *North Central Area Airline Service Airport Investigation*, Docket 13743; *Greensboro-High Point/Winston-Salem Service Through A Single Airport*, Docket 3496; *Service to Ogdensburg, N. Y. Case*, Docket 13335.

the public interest in concentrating air service for several communities at a single airport.[2] Our stress on the desirability of consolidating air service for closely located communities is a vital part of our effort to assist the air transportation industry to realize the full economic potential of its greatly expanded capacity in new high performance equipment without resulting in inconvenience to the users and without adversely affecting the public interest. Consequently, we intend systematically to focus on each situation in which there is a potential public interest in providing service to closely located communities through a single airport.

It is, therefore, understandable why our attention should be drawn to the question of whether scheduled air service to Dallas and Fort Worth should be rendered through a single airport. These communities, which are less than 31 miles apart, have long been concerned with the question of the airport through which they would receive air service. In recent years, the effort on the part of the communities has been to obtain or retain a full pattern of air services to meet their individual needs.[3] In fact, there is currently pending before the Board a further proceeding involving questions of adequacy of air service at Fort Worth. These proceedings have been premised on the assumption that these communities should receive air service through separate airports. In this, they were consistent with the policy guidelines which had their grounding in

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[2] *Piedmont Local Service Area Investigation*, Docket 5713, *et al.*, Order E-18123, pp. 12-14; *Pacific Southwest Local Service Case*, Docket 5645, *et al.*; *Southern Transcontinental Service Case*, Docket 7984, *et al.*, Order E-16860 and Order E-17651; *Service to Sheboygan and Manitowoc, Wisconsin Area*, Docket 9767; *Southern Airways "Use It Or Lose It" Investigation and Route Realignment*, Docket 13564.

[3] *Fort Worth Investigation*, Docket 7382.

the economics and operations which preceded the advent of the new jet equipment.[4]

We have, however, not as yet focused fairly on the question of whether Dallas and Fort Worth should be served

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[4] In the memorandum forwarded with its letter relative to Adequacy of Service Problems addressed to all air carriers and many civic bodies under date of May 5, 1961, in referring to past adequacy of service cases, the Board made the following statement, *inter alia:*

"An important problem indicated by those cases was the proximity of the complaining cities to a major air transportation center through which the air carriers provided a well-rounded pattern of service. This situation has been compounded during recent years through the development of longer range aircraft and the operational and economic problem of serving two cities as consecutive points when the distance between them is relatively short.

"The conversion by trunkline carriers from a piston-type fleet to a predominantly jet-powered fleet has made more complex the economic problems of air carriers; and for some cities certificated for trunkline service, has created, or may in the future create problems relating to through-plane service and schedule frequency. Many cities do not have airport facilities capable of handling jet operations. In other instances, where cities do have adequate airport facilities, the proximity to other cities with similar facilities may make the provision of a well-rounded pattern of jet service to both points economically unsound. With jet airliners almost doubling the capacity of piston-type aircraft, it is fundamental that in the near term the same frequency of service cannot be operated to every point as has been in the past.

"To enumerate all the problems from both the airline and the city standpoint which have arrived with the conversion to jet equipment would require many pages of detail. These are problems of which we are sure the recipients of this letter are only too well aware. There are, however, several suggestions which are worthy of consideration toward meeting some of these problems. The first of these is the creation of regional airports. In certain situations, in order that all communities within a given area might be assured of adequate jet transportation, it would appear necessary that the communities jointly decide which airport should be used, or in some instances, at what point a new airport can be constructed to better serve the needs of all."

through a single airport. As we have previously noted, we should in due course have undertaken such task as part of our national program. However, we have recently been apprised of the intention of both of these communities to invest substantial funds to meet the anticipated needs of increased air carrier services at airports which are only 12 miles apart. Since our resolution of this matter could have a decided effect on the need for enlarged facilities at one or both of the communities, it appeared incumbent upon us to advance the time for a review of this situation.

Accordingly, It Is Ordered:

1. That an investigation, to be known as the *Dallas-Fort Worth Regional Airport Investigation*, Docket 13959, be and it hereby is instituted pursuant to sections 204, 401 and 1002 of the Act, to determine whether the public convenience and necessity require the alteration, amendment or modification of the certificates of all air carriers authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Fort Worth be served through a single airport to be designated therein;

2. That a copy of this order shall be served upon the Cities and Chambers of Commerce of Dallas and Fort Worth, Texas, and upon American Airlines, Inc., Braniff Airways, Inc., Central Airlines, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., and Trans-Texas Airways, Inc., who are hereby made parties to this proceeding;

3. That the proceeding ordered herein be assigned for hearing before an examiner of the Board at a time and place hereafter to be designated;

4. That this order be published in the Federal Register.

By the Civil Aeronautics Board:

Mabel McCart
Acting Secretary

(Seal)

APPENDIX B

Order 73-9-82

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 21st day of September, 1973

DOCKET 13959

DALLAS-FORT WORTH REGIONAL
AIRPORT INVESTIGATION

Order Terminating Investigation

This investigation was instituted by the Board on August 20, 1962 (Order E-18719, amended on December 19, 1962 by Order E-19117), to determine whether the public convenience and necessity require the alteration, amendment, or modification of the certificate or certificates of (1) all air carriers, (2) the local service carriers, (3) the trunkline carriers, or (4) any individual air carrier or air carriers authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Fort Worth be served through a single airport to be designated in this proceeding.

After due notice a public hearing was held before Administrative Law Judge Ross I. Newmann, who thereafter issued his initial decision on April 7, 1964, in which he concluded that it would not be in the public interest to designate either GSIA or Love Field as a regional airport to serve the Dallas-Fort Worth area. Judge Newmann recognized, however, that both cities would benefit if a fair and equitable solution to their problems could be worked out. As a possible solution, he suggested the creation of an Airport Authority which would assume full

responsibility for the planning, development, and operation of all airports in the Dallas-Fort Worth area.

On September 30, 1964, the Board issued an order (E-21341) stating it was unanimously of the opinion that service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present and future requirements for transcontinental passenger and cargo services. The order gave the two cities a period of 180 days within which to arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service and to submit such agreement to the Board.

When the two cities failed to reach an agreement, the Board issued Order E-22028 on April 13, 1965, stating that it was firmly of the view that a voluntary agreement on the part of both cities is the best solution to their airport problem and that the Board was prepared to assist them in reaching such an agreement. The Board therefore remanded the case to the administrative Law Judge with full authority to assist the parties in their efforts to reach a definitive agreement.

Following our order of remand, the Administrative Law Judge held a series of meetings with representatives of both cities in Washington, D. C., Fort Worth, and Dallas. As a result, the Dallas Fort Worth Regional Airport Board was established on September 27, 1965, under Texas Revised Civil Statutes, and was given permanent status by the City Councils of Dallas and Fort Worth. On April 15, 1968, the cities signed a contract creating provisions for the construction and operation of the Dallas-Fort Worth Airport. Under the contract, the airport will be owned and operated by or on behalf of and under the control of the cities. The Board was authorized to plan, acquire, establish, develop, construct, operate, regulate, and police the airport, and was charged with the responsibility

of exercising on behalf of the cities the powers of each with respect thereto.

In its ultimate development the Dallas-Fort Worth Airport will have six primary instrument runways capable of three simultaneous operations, and a ground capacity of 230 passenger-aircraft gates and 200 all-cargo gates. Under Phase I, which is to be opened this fall, the Dallas-Fort Worth Airport will provide a three-runway layout capable of simultaneous aircraft operations, with a total of 66 passenger gates and 12 cargo gates. Phase I cost is estimated at approximately $700 million.

In view of the foregoing, we find that the new Dallas-Fort Worth Airport will provide an adequate facility to accommodate the air transportation needs of Dallas and Fort Worth and the surrounding counties that constitute their tributary market-base region. We further find that the primary purpose and objective of this investigation has been accomplished.

ACCORDINGLY, IT IS ORDERED THAT:

The investigation in Docket 13959 be and it hereby is terminated.

This order shall be published in the Federal Register.

By the Civil Aeronautics Board:

(SEAL)

EDWIN Z. HOLLAND
Secretary

APPENDIX C

AVIATION DAILY TUE. OCT. 8
1156 15th ST., N.W., WASHINGTON, D.C. 20005
TELEX 89-2447 202-293-3400
1974 VOL. 215 NO. 26

AIRPORT AID PROGRAM BECOMING HEATED ISSUE

Transportation Department is taking a close look at the Airport Development Aid Program (ADAP) to determine what it may want to *"change or throw out as a national policy"* according to Secretary Claude Brinegar. While saying the program is "clearly facing an extension" and that DOT is "not about to say no to ADAP," Brinegar said he has a group trying to determine the "pros and cons" of the program and find what has been accomplished in the years ADAP has been in existence.

Brinegar said ADAP has become an "increasingly hot policy issue." This view is similar to one expressed earlier by Sen. Howard Cannon (D-Nev.), who said *ADAP is expected to be the "biggest issue" next year before Cannon's aviation subcommittee* (DAILY, Aug. 7).

Brinegar said that the era of the super airports such as Dallas/Fort Worth is coming to an end. Greater emphasis will be placed on managing the capacity of existing airports "as best we can," he said. One way this could be done is by increasing use of airports replaced by giant airport complexes such as Chicago Midway and Dallas Love Field.

Brinegar also said of the cost allocation study that there is a "lingering desire" on the part of DOT to "make peace" with the study, to bring its issues into perspective. Problem is that DOT may end up with a departmental concept of cost allocation that does not fit into the "considerations of congressional wishes." While admitting

that DOT does not "honestly know" how financing of airports should be allocated, Brinegar said that he is studying worldwide cost allocation programs to see how this is done elsewhere.

Brinegar said FAA is a "strong and independent agency," and while there were some areas of disagreement between DOT and FAA the agency should be "left alone" in areas in which it is competent. Brinegar opposed the concept of some FAA functions being allocated to individual state aviation agencies. While he would like to see the states addressing the question of transportation planning, Brinegar said that the states do not have the centralized expertise that exists in FAA.

Aviation has become the number one priority within DOT because of the international situation, Brinegar said. About 50% of his time is now spent involved in the Pan Am-TWA problem, he said. Priorities are established in DOT by time required to handle crises within the different modes of transportation, Brinegar said, and the aviation problem is now "number one" in time consumption.

Post Office Drops Airtrans System At Dallas/Fort Worth

U.S. Postal Service discontinued use Friday of the Dallas/Fort Worth Airport Airtrans system for movement of air mail between aircraft and air mail facilities despite announcement by DFW that Airtrans is "revenue operational."

Airtrans use was discontinued after it "failed to live up to requirements," a USPS spokesman told The DAILY. Criteria established by the Postal Service had included delivery between aircraft and air mail facilities within one hour, a time period which is "as long or longer than any other airport in the country," the spokesman said.

Failure to meet the one-hour deadline occurred 15% of the time, said LTV Aerospace Corp., manufacturer of the

Airtrans system, with 11% caused by loading and unloading delays. The remaining 4% was caused by delay or malfunction of the Airtrans cars, LTV said.

Major loading and unloading delays were caused by unexpected increases in air mail volume by as much as 50%, due in part to use of air for first class mail and to miscalculation of peak hour expectations by two

(Continued On Following Page)

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF TEXAS—DALLAS DIVISION

Civil Action, File No. CA-3-5927

THE CITY OF DALLAS, TEXAS, THE CITY OF FORTH WORTH, TEXAS, AND THE DALLAS-FORT WORTH REGIONAL AIRPORT BOARD, *Plaintiffs*,

v.

SOUTHWEST AIRLINES CO., *Defendant*

Complaint for Declaratory Relief

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth Regional Airport Board, and each of them, and respectfully represent and allege as follows:

I.

a) Jurisdiction is founded on the existence of a Federal question and amount in controversy. The action arises under The Federal Aviation Act of 1958 (Public Law No. 85-726, 85th Congress, 2nd Session, 72 Stat. 731; 49 U.S.C. 1301 et seq.), as amended. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

b) Jurisdiction is founded on the existence of a question arising under particular statutes. The action arises under The Federal Aviation Act of 1958 (Public Law No. 85-726, 85th Congress, 2nd Session, 72 Stat. 731; 49 U.S.C. 1301 et seq.), as amended, as hereinafter more fully appears.

II.

This is an action for a declaratory judgment pursuant to 28 USC § 2201, for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears.

III.

Plaintiffs, the City of Dallas, Texas, and the City of Fort Worth, Texas, are municipal corporations of the State of Texas, duly organized and existing under the authority of Article XI, Section 5, of the Constitution of the State of Texas, the laws of the State of Texas, and by their respective Home Rule Charters.

IV.

In 1962, the City of Dallas, Texas, was the duly authorized owner and operator of Love Field, an airport providing facilities for scheduled air carrier service to and from Dallas, Texas, and vicinity, and the City of Fort Worth, Texas, was the duly authorized owner and operator of Greater Southwest International Airport, an airport providing facilities for scheduled air carrier service to and from Fort Worth, Texas, and vicinity.

V.

On August 20, 1962, the Civil Aeronautics Board, an agency of the United States Government, instituted an investigation under Docket No. 13959 (by Order No. E-18719, amended on December 19, 1962, by Order No. E-19117) to determine whether the public convenience and necessity required the alteration, amendment, or modification of the certificate or certificates of (1) all air carriers, (2) the local service carriers, (3) the trunkline carriers, or (4) any individual air carrier or air carriers authorized to serve either or both Dallas and Fort Worth, Texas, in such manner as to require that Dallas and Fort Worth be

served through a single airport to be designated in the proceedings. A true and correct copy of said Order No. E-18719 is attached hereto, designated as Exhibit A to this Complaint, and adopted herein for all purposes by reference; and a true and correct copy of said Order No. E-19117 is attached hereto, designated as Exhibit B to this Complaint, and adopted herein for all purposes by reference.

VI.

The Civil Aeronautics Board's Order of Investigation made the Cities of Dallas and Fort Worth parties to the proceeding as well as the following air carriers: American Airlines, Inc., Braniff Airways, Inc., Central Airlines, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., Eastern Air Lines, Inc., and Trans-Texas Airways, Inc. (now Texas International Airlines, Inc.). The Citizens Aviation Association of Dallas, and Compania Mexicana de Aviacion, S.A., were permitted to intervene. The Federal Aviation Administration (then Federal Aviation Agency) did not intervene but presented evidence and participated in the public hearings. Public hearings for the presentation of evidence by all parties were held in Arlington, Texas, Dallas, Texas, and Washington, D.C. Briefs were filed by the City of Dallas, the City of Fort Worth, American Airlines, Inc., Braniff Airways, Inc., The Citizens Aviation Association, and the Civil Aeronautics Board's Bureau of Economic Regulation.

VII.

Based upon the full record of the investigation, the briefs of the parties, and the initial decision of the hearing examiner, the Civil Aeronautics Board adopted Order No. E-21341 on September 30, 1964, declaring the unanimous opinion of the Civil Aeronautics Board that air carrier service to Dallas and Fort Worth should be required through a single airport which meets, without limitation, the present

and future requirements for transcontinental cargo and passenger services. A true and correct copy of said Order No. E-21341 is attached hereto, designated as Exhibit C to this Complaint, and adopted herein for all purposes by reference. This Order gave Dallas and Fort Worth 180 days within which to arrive at a voluntary agreement concerning the location of the airport to be used for the consolidated service and to submit such agreement to the Civil Aeronautics Board.

VIII.

The inability of the Cities of Dallas and Fort Worth to agree within 180 days on a voluntary agreement as to the airport to be designated by the Civil Aeronautics Board as the single airport to serve the two cities resulted in the adoption by the Civil Aeronautics Board of Order No. E-22028 on April 13, 1965, remanding the proceeding to the Examiner for the purpose of assisting the Cities of Dallas and Fort Worth in reaching a definitive agreement with respect to their airport problems, making any such agreement part of the official record in the proceeding, and entering an appropriate order terminating the investigation. While definitive agreement has been reached between the Cities of Dallas and Fort Worth, as hereinafter more fully appears, no order terminating the investigation has ever been entered and the entire proceeding remains open to this date, and under the continuing jurisdiction of the Civil Aeronautics Board. A true and correct copy of said Order No. E-22028 is attached hereto, designated as Exhibit D to this Complaint, and adopted herein for all purposes by reference.

IX.

Pursuant to the Civil Aeronautics Board's Order No. E-22028 described in Paragraph VIII, the Examiner proceeded to meet with representatives of the Cities of Dallas and Fort Worth. The first definitive agreement resulting

from these meetings was a Memorandum of Understanding dated March 28, 1965. This Memorandum of Understanding was approved by the City Councils of both Dallas and Fort Worth. The essential points of the agreement were:

(1) Both cities will support the joint airport authority constitutional amendment to be submitted to the voters of the State in November, 1966, as well as mutually acceptable joint authority enabling legislation in accordance with such constitutional amendment, and shall endeavor to obtain a favorable vote by the taxpayers of their respective counties to become a part of such joint airport authority.

(2) Both cities will cooperate fully in obtaining as promptly as possible the services of a completely independent airport planning consultant or engineer of national stature whose assignment will be to recommend, after study, to be done as expeditiously as possible, the precise site, size and configuration of a regional airport, such site to be located between Dallas and Fort Worth and limited only by Tarrant and Dallas Counties, North and South. The work on said study shall commence without delay and shall be pursued to completion, if possible within 60 days from the date of employment. The consultant or engineer shall have the benefit of all prior studies made by both cities. The cost of the study shall be borne equally by the two cities.

(3) Both cities recognize the importance of necessary land acquisition as promptly as possible after selection of the site and will cooperate in working out the necessary mechanics for such acquisition.

(4) Dallas and Fort Worth will proceed immediately to establish an interim organization with power to take initial steps to insure the expeditious planning,

financing, and construction of the regional airport, the construction to be completed and operational by 1971 but in no event later than 1973.

(5) Dallas and Fort Worth will submit progress reports to the Board at such intervals as the Board shall require.

The progress reports to the Civil Aeronautics Board mentioned in point (5) are being made at regular intervals to this date, the most recent report having been made on December 28, 1971. A true and correct copy of the Memorandum of Understanding is attached hereto, designated as Exhibit E to this Complaint, and adopted herein for all purposes by reference.

X.

The next definitive agreement reached under the Civil Aeronautics Order No. E-22028 described in Paragraph VIII was a Contract and Agreement dated September 27, 1965, by and between the City of Dallas and the City of Fort Worth establishing the Dallas-Fort Worth Joint Regional Airport Board under the authority of the Municipal Airports Act, Article 46d-1 through Article 46d-22, Revised Civil Statutes of the State of Texas. A true and correct copy of said Contract and Agreement is attached hereto, designated as Exhibit F to this Complaint, and adopted herein for all purposes by reference. This Contract and Agreement was for a term of three years, and Paragraph 7 thereof expressed the intention of the Cities of Dallas and Fort Worth that this initial organization would be terminated and transferred to a Bi-County Regional Airport Authority upon approval of a Texas constitutional amendment authorizing same, enactment of enabling legislation by the Texas Legislature and a favorable vote in an election to be held in Dallas and Tarrant Coun-

ties. While the Amendment to the Constitution of Texas, Article 9, Section 12, was adopted by the voters of Texas in an election held on November 8, 1966, and the enabling legislation was passed, the issue for the creation of the North Central Texas Airport Authority in Dallas and Tarrant Counties was defeated by the voters of Dallas County in an election on June 6, 1967.

XI.

The failure of the Bi-County Airport Authority proposition required the Cities of Dallas and Fort Worth to restructure the interim Dallas-Fort Worth Joint Regional Airport Board into a permanent body and this was accomplished under a new Contract and Agreement dated and effective as of April 15, 1968, continuing, expanding and further defining the powers and duties of the Dallas-Fort Worth Regional Airport Board, creating the Joint Airport Fund of the Cities and providing for the construction and operation of the Dallas-Fort Worth Regional Airport. A true and correct copy of said Contract and Agreement of April 15, 1968, is attached hereto, designated as Exhibit G to this Complaint, and adopted herein for all purposes by reference.

XII.

The Contract and Agreement of April 15, 1968, contains the present agreement between the Cities of Dallas and Fort Worth as to the Dallas-Fort Worth Regional Airport to be designated as the single airport to serve the scheduled air carrier needs of the two cities, including the plans and program for implementing the Agreement, all as ordered by the Civil Aeronautics Board in the concluding paragraph of its Order No. E-21341, described in Paragraph VII and set forth in Exhibit C to this Complaint.

XIII.

Plaintiff, Dallas-Fort Worth Regional Airport Board, is the administrative operating Board of Directors for the Dallas-Fort Worth Regional Airport.

XIV.

Pursuant to the Contract and Agreement of April 15, 1968, (Exhibit G) and on the recommendation of the Dallas-Fort Worth Regional Airport Board, the City Councils of Dallas and Fort Worth adopted the 1968 Regional Airport Concurrent Bond Ordinance authorizing the issuance of Dallas-Fort Worth Regional Airport Joint Revenue Bonds for the financing of the Airport. A true and correct copy of said 1968 Regional Airport Concurrent Bond Ordinance is attached hereto, designated as Exhibit H to this Complaint, and adopted herein for all purposes by reference. Under the 1968 Ordinance and five ordinances supplemental thereto, Plaintiffs have authorized and issued $422,000,000.00 of bonds in six series, all of which are presently outstanding:

1. Series 1968, dated 11-1-68, $35,000,000.00.
2. Series 1970, dated 4-1-70, $50,000,000.00.
3. Series 1970A, dated 11-1-70, $50,000,000.00.
4. Series 1971, dated 3-1-71, $75,000,000.00.
5. Series 1971A, dated 9-1-71, $100,000,000.00.
6. Series 1972, dated 3-1-72, $112,000,000.00.

In further implementation of the Agreement to provide a single airport to serve the scheduled air carrier needs of the two cities as ordered by the Civil Aeronautics Board, Plaintiffs Dallas and Fort Worth have acquired in fee as of February 1, 1972, 16,956 acres of land, more or less, at a cost to that date of $57,930,560.00, out of proceeds from tax-supported bonds and warrants.

XV.

The Dallas-Fort Worth Regional Airport is scheduled to become operational in July, 1973.

XVI.

The $422,000,000.00 of Revenue Bonds mentioned in Paragraph XIV of this Complaint are payable from and secured by an irrevocable first lien and pledge of "Pledged Revenues". "Pledged Revenues," as defined in the six ordinances, are gross revenues derived from the ownership and operation of the Dallas-Fort Worth Regional Airport.

The Cities of Dallas and Fort Worth, pursuant to all of the foregoing orders of the Civil Aeronautics Board, have agreed in the six ordinances:

(1) to provide for the orderly, efficient and effective phase-out at Love Field and Redbird Airports (owned and operated by the City of Dallas) and at Greater Southwest International Airport and Meacham Field (owned and operated by the City of Fort Worth) of any and all scheduled air carrier services, and to transfer such activities to the Dallas-Fort Worth Regional Airport effective upon the beginning of operations at the Dallas-Fort Worth Regional Airport;

(2) that they will through every legal and reasonable means promote the optimum development of the lands and facilities comprising the Dallas-Fort Worth Regional Airport at the earliest practicable date;

(3) that the Dallas-Fort Worth Regional Airport Board shall fix, place into effect and from time to time revise, directly or through leases, contracts and agreements with users of the Airport, schedules of rentals, rates, fees and charges for the use, operation and occupancy of the Dallas-Fort Worth Regional Airport and the services appertaining thereto, which will produce the necessary Pledged Revenues; and

(4) that to the full extent they lawfully may, no free use of the land, public roads and way comprising a part of the Dallas-Fort Worth Regional Airport shall be allowed or permitted.

The prospective rentals, rates, fees and charges for the use, operation and occupancy of the Dallas-Fort Worth Regional Airport by Defendant and the scheduled air carriers competing with Defendant over the same routes greatly exceed the sum of $10,000.00.

XVII.

Pursuant further to Order No. E-21341 (Exhibit C) of the Civil Aeronautics Board as described in Paragraph VII of this Complaint, the Dallas-Fort Worth Regional Airport Board on February 9, 1970, executed agreements with all scheduled air carriers then serving Dallas-Fort Worth wherein such carriers agreed to move their scheduled air carrier services serving the Dallas-Fort Worth Area to the Dallas-Fort Worth Regional Airport when it becomes operational. These carriers are:

American Airlines, Inc.
Braniff Airways, Inc.
Continental Airlines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Frontier Airlines, Inc.
Ozark Airlines, Inc.
Texas International Airlines, Inc.

Each of the above air carriers operates solely under the authority and jurisdiction of the Civil Aeronautics Board.

Under the agreements with the Dallas-Fort Worth Regional Airport Board, each of the above air carriers has agreed that it will pay annually rentals, fees and charges for its use, operations and occupancy of the Dallas-Fort Worth Regional Airport premises and facilities and the

services appertaining thereto in an amount which, together with rentals, fees and charges paid by other airlines and others using the Dallas-Fort Worth Regional Airport premises and facilities, will be sufficient to produce total gross revenues required to satisfy the Dallas-Fort Worth Regional Airport Board's obligation under the bond ordinances described in Paragraphs XIV and XVI of this Complaint.

XVIII.

Defendant, Southwest Airlines Co., is a Texas corporation, operating under a certificate of public convenience and necessity number 22, issued by the Texas Aeronautics Commission on November 6, 1970. Under said certificate number 22, Southwest Airlines Co. is authorized to operate as an intrastate common carrier by air for the transportation of persons and property, utilizing Federal Aviation Administration Certificated aircraft of any gross take-off weight, between and among the points Dallas Fort Worth, Houston and San Antonio, Texas. Southwest Airlines is authorized to begin or terminate, and begin and terminate, service at any airports serving those points named above.

XIX.

Defendant commenced the operations mentioned in Paragraph XVIII of this Complaint in June or July of 1971, serving the point Dallas/Fort Worth from Love Field, which on said date of commencement of service was the only airport serving said point.

XX.

Defendant performs the operations mentioned in Paragraph XVIII of this Complaint in competition with two interstate carriers, Braniff Airways, Inc., and Texas International Airlines, Inc. These interstate carriers operate solely under the authority and jurisdiction of the Civil Aeronautics Board.

XXI.

Braniff Airways, Inc., and Texas International Airlines, Inc., were original parties to the Civil Aeronautics Board Investigation under Docket No. 13959 as described in Paragraphs V, VI, and VII of this Complaint, as well as parties to the Agreements with the Dallas-Fort Worth Regional Airport Board described in Paragraph XVII of this Complaint.

XXII.

On or about August 2, 1971, Defendant Southwest Airlines Co., through its President, Lamar Muse, was invited to attend regular monthly planning meetings at the offices of the Dallas-Fort Worth Regional Airport Board for the purpose of arranging and planning for the transfer of its scheduled air carrier service to the Dallas-Fort Worth Regional Airport in mid-1973, when it would become the single airport for air carrier service to Dallas and Fort Worth as ordered by the Civil Aeronautics Board. On or about October 20, 1971, Defendant, through its Vice President-Marketing, Richard Elliot, informed the Board through its Consultant for Properties and Facilities, Charles W. Cronin, that Southwest Airlines Co. would attend no further planning meetings and that Southwest Airlines Co. intended to continue its operations to and from Love Field in Dallas, Texas, and William P. Hobby Airport in Houston, Texas, after the opening of the Dallas-Fort Worth Regional Airport.

XXIII.

In connection with the Southwest Airlines Co. operations to and from William P. Hobby Airport in Houston, Texas, on November 12, 1971, the office of the Regional Counsel of the Federal Aviation Administration issued a written opinion to the Department of Aviation of the City of Houston, Texas, stating that existing grant agreements between the City of Houston and the United States of America require the City of Houston to keep its airports open to "all types,

kinds, and classes of aeronautical use without discrimination between such types, kinds, and classes," but that such grant agreements then provide:

> "... the sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public".

The opinion further stated:

> "We advised you recently that should the City allow an intrastate scheduled air carrier to operate into Hobby Airport and at the same time prohibit other scheduled air carriers from using that airport, the city would be in violation of the terms of its grant agreements because it would be unjustly discriminating between classes of aeronautical use."

A true and correct copy of said opinion of the office of the Regional Counsel of the Federal Aviation Administration is attached hereto, designated as Exhibit I to this Complaint, and adopted herein for all purposes by reference.

Identical Federal Grant agreements have been made by the City of Dallas with respect to the Love Field Airport. As Plaintiffs have hereinabove shown, the Civil Aeronautics Board has determined in the case of service to Dallas/Fort Worth that single airport service is required to serve the civil aviation needs of the public, and the single airport is to be the Dallas-Fort Worth Regional Airport upon its opening.

XXIV.

In the period between November, 1971, and March 1972, various officers and attorneys of Defendant, Southwest Airlines Co., have been quoted in Dallas and Fort Worth area newspapers and on Dallas and Fort Worth area television stations as declaring for Southwest Airlines Co. an intention to continue its operations at Love Field after the

opening of the Dallas-Fort Worth Regional Airport and to resist with every available legal remedy any requirement to operate from the Dallas-Fort Worth Regional Airport as the single airport serving Dallas and Fort Worth upon its opening.

This course of action by Defendant's officers and attorneys has generated grave concern on the part of interstate scheduled air carriers competing with Defendant over the same routes as those served by Defendant, and Plaintiff attaches hereto and designates as Exhibit J, a true and correct copy of a letter dated November 23, 1971, from W. Lloyd Lane, then President of Texas International Airlines, Inc., to Erik Jonsson, Chairman of the Dallas-Fort Worth Regional Airport Board, in evidence thereof.

XXV.

On March 6, 1972, Defendant, Southwest Airlines Co., filed with Plaintiff, Dallas-Fort Worth Regional Airport Board, a Petition for Determination of Exemption And, In the Alternative, Application of Waiver from "1968 Regional Airport Concurrent Bond Ordinance." A true and correct copy of said Petition is attached hereto, designated as Exhibit K to this Complaint and adopted herein by reference solely for purposes of showing the actual controversy between the parties, and without admitting any part thereof, but on the contrary Plaintiffs wholly deny the truth of same.

XXVI.

During the time since March 6, 1972, that Plaintiff, Dallas-Fort Worth Regional Airport Board has had the subject matter of said Petition under deliberation, and specifically on May 9, 1972, Thomas M. Sullivan, Executive Director of the Dallas-Fort Worth Regional Airport Board received a letter on the letterhead of Akin, Gump, Strauss, Hauer and Feld, Attorneys at Law, Dallas, Texas, as At-

torneys for Defendant, Southwest Airlines Co., notifying the Dallas-Fort Worth Regional Airport Board of the intention of Southwest Airlines Co. to proceed with the legal remedies available unless a satisfactory response to its Petition described in Paragraph XXV, of this Complaint, was received by Friday, May 19, 1972. A true and correct copy of said letter, dated May 8, 1972, is attached hereto, designated as Exhibit L, and adopted herein by reference solely for purposes of showing the actual controversy between the parties.

XXVII.

The Petition of Southwest Airlines Co. to the Dallas-Fort Worth Regional Airport Board described in Paragraph XXV of this Complaint, and as set forth in Exhibit L asserts:

(a) that the provisions of the 1968 Regional Airport Concurrent Bond Ordinance described in Paragraph XIV of this Complaint and attached hereto as Exhibit H, cannot apply to Southwest Airlines Co. and its operations at Love Field because such application would not be legally permissible under Federal and State law; and

(b) in the alternative, that Southwest Airlines Co. is entitled to a waiver pursuant to Article IX, Section 9.5 of the 1968 Regional Airport Concurrent Bond Ordinance because such a waiver is in the interest of satisfying an overriding public need for decentralized certificated air carrier services in the Dallas-Fort Worth metropolitan region considered as a whole.

XXVIII.

On June 6, 1972, the Dallas-Fort Worth Regional Airport Board passed a resolution determining that it was

without jurisdiction to proceed to hear or act upon the Petition of Southwest Airlines Co. because:

(a) the Civil Aeronautics Board, an agency of the United States, has exercised its controlling jurisdiction to determine that, in order to serve the civil aviation needs of the public, Dallas and Fort Worth, Texas, shall be served by scheduled air carriers at a single airport;

(b) the Cities of Dallas and Fort Worth, acting under the direct orders of the Civil Aeronautics Board so to do, reached agreement, including the plans and program for implementing the agreement, on the location and construction of the Dallas-Fort Worth Regional Airport to be designated by the Civil Aeronautics Board as the single airport to serve the needs of the two cities for scheduled air carrier service; and

(c) neither the 1968 Regional Airport Concurrent Bond Ordinance nor any other enactment, State or local, authorizes the Regional Airport Board to implement any policy designed to further, permit or require scheduled air carrier service to and from Dallas/Fort Worth at other than a single airport while the Civil Aeronautics Board ruling to the contrary is in effect.

A true and correct copy of said Resolution by the Dallas-Fort Worth Regional Airport Board is attached hereto, designated as Exhibit M to this Complaint, and adopted herein for all purposes by reference.

XXIX.

Plaintiffs say that not only does Federal law authorize Plaintiffs to transfer all scheduled air carrier services to the Dallas-Fort Worth Regional Airport upon its opening, on a non-discriminatory basis, but that Plaintiffs cannot

be required under Federal law, or any State law or local enactment:

(a) to allow interstate carriers to continue to operate at Love Field in competition with Defendant, contrary to the determination of the public convenience and necessity by the Civil Aeronautics Board; or

(b) to limit the use of Love Field to intrastate carriers such as Defendant, thereby discriminating against the interstate carriers in competition with Defendant over the same routes, and contrary to the ruling of the Federal Aviation Administration described in Paragraph XXIII of this Complaint.

XXX.

By reason of the rulings of the two agencies of the United States Government under the Federal Aviation Act of 1958 (Public Law No. 85-726, 85th Congress, 2nd Session, 72 Stat. 731; 49 USC 1301 et seq.), as amended, with which rulings Plaintiffs have agreed to comply and stand ready to comply, and the conflicting claims of Defendant which greatly interfere with the planning and procedure necessary to accomplish an orderly transfer of all scheduled air carrier services to the Dallas-Fort Worth Regional Airport upon its opening, Plaintiffs allege:

(1) that a declaratory judgment by this court is urgently required to settle the rights of the parties;

(2) that a speedy hearing of this action for a declaratory judgment is required as authorized under rule 57 of the Federal Rules of Civil Procedure; and

(3) that this court in its discretion should advance this proceeding on the calendar.

XXXI.

Plaintiffs, the City of Dallas, Texas, the City of Fort Worth, Texas, and the Dallas-Fort Worth Regional Airport Board request Defendant, Southwest Airlines Co., before

the expiration of forty-five (45) days after service of the Summons and Complaint upon it to make the following admissions for the purpose of this pending action only and subject to all pertinent objections to admissibility which may be interposed at the trial: That each of the following documents, which are alphabetically lettered exhibits attached to this Complaint, is genuine:

A) Civil Aeronautics Board's Order No. E-18719 ordering an investigation under Docket No. 13959, dated August 20, 1962.

B) Civil Aeronautics Board's Order No. E-19117, being an amendment to Order E-18719, dated December 19, 1962.

C) Civil Aeronautics Board's Order No. E-21341, declaring its unanimous opinion that the Cities of Dallas and Fort Worth should be served through a single Airport, dated September 30, 1964.

D) Civil Aeronautics Board's Order No. E-22028, remanding the proceeding to the Examiner for purpose of assisting the two Cities, dated April 13, 1965.

E) The Memorandum of Understanding between the Cities of Dallas and Fort Worth, dated March 28, 1965.

F) Contract and Agreement between the Cities of Dallas and Fort Worth establishing the Dallas-Fort Worth Joint Regional Airport Board, dated September 27, 1965.

G) Contract and Agreement between the Cities of Dallas and Fort Worth establishing the Dallas-Fort Worth Regional Airport Board, dated April 15, 1968.

H) The 1968 Regional Airport Concurrent Bond Ordinance of the Cities of Dallas and Fort Worth, dated November 12, 1968.

I) Legal Opinion from the Office of Regional Counsel of the Federal Aviation Administration to the Depart-

ment of Aviation of the City of Houston, Texas, dated November 12, 1971.

J) Letter from W. Lloyd Lane, then President of Texas International Airlines, Inc., to Erik Jonsson, Chairman of the Dallas-Fort Worth Regional Airport Board, dated November 23, 1971.

K) Petition of Southwest Airlines Co., to the Dallas-Fort Worth Regional Airport Board, dated March 6, 1972.

L) Letter from Attorneys for Southwest Airlines Co. to Thomas M. Sullivan demanding satisfactory action on the Airlines' Petition, dated May 8, 1972.

M) Resolution of the Dallas-Fort Worth Regional Airport Board declaring its lack of jurisdiction to consider the Petition of Southwest Airlines Co., dated June 6, 1972.

WHEREFORE, Plaintiffs respectfully pray that the court adjudge:

1. That Plaintiffs are not prohibited under the Federal Aviation Act of 1958 (Public Law No. 85-726, 85th Congress, 2nd Session, 72 Stat. 721; 49 USC 1301 et seq.), as amended, or any other applicable Federal law, from transferring all scheduled air carrier service, both intrastate and interstate, to a single airport to be designated as the Dallas-Fort Worth Regional Airport.

2. That due to the exercise of jurisdiction by the Civil Aeronautics Board determining that Dallas and Fort Worth shall be served by interstate carriers at a single airport, Plaintiffs cannot lawfully be prevented under any provision of State law or local enactment from requiring, on a non-discriminatory basis, that all scheduled air carrier service be to and from a single airport.

3. That the Dallas-Fort Worth Regional Airport Board is without jurisdiction to determine overriding public need for decentralized certificated air carrier service

in the Dallas-Fort Worth metropolitan region considered as a whole while a contrary determination of the public convenience and necessity by the Civil Aeronautics Board continues in effect.

4. That Plaintiffs shall have such other and further declaratory relief as they shall show themselves to be justly entitled.

5. That Plaintiffs recover their costs.

DATED: June 6th, 1972.

CITY OF DALLAS, TEXAS

By /s/ N. ALEX BICKLEY
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CITY OF FORT WORTH, TEXAS

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DALLAS-FORT WORTH REGIONAL AIRPORT BOARD

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